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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

MARIA GUADALUPE NAVARRO,
Appellant,

VS.

AGRICULTURAL LABOR RELATIONS BOARD OF THE STATE OF CALIFORNIA AND UNITED FARM WORKERS OF AMERICA, AFL-CIO,
Appellees.

On Appeal from the California Court of Appeal, First Appellate District

JURISDICTIONAL STATEMENT

Of Counsel:
JAMES S. BURLING
Pacific Legal Foundation
555 Capitol Mall, Suite 350
Sacramento, CA 95814
Telephone: (916) 444-0154

RONALD A. ZUMBRUN
ROBIN L. RIVETT
Counsel of Record
Pacific Legal Foundation
555 Capitol Mall, Suite 350
Sacramento, CA 95814
Telephone: (916) 444-0154
Attorneys for Appellant

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

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QUESTIONS PRESENTED

I. Whether the operation of Section 1153(c) of the California Labor Code constitutes state action when that section authorizes labor unions and employers to enter into collective bargaining agreements that force farm workers to either lose their jobs or comply with formal union requirements other than payment of dues, assessments, and initiation fees.

II. Whether a farm worker's rights to freedom of association and to pursue a lawful occupation under the First and Fourteenth Amendments of the United States Constitution are impermissibly violated by Section 1153(c) when that section sanctions a collective bargaining agreement authorizing a farm worker to lose her job not for failing to pay dues, assessments, or initiation fees, but for failing to abide by formal union requirements.

III. Whether a farm worker's right to equal protection of the laws under the Fourteenth Amendment of the United States Constitution is impermissibly violated by Section 1153(c) when that section sanctions a collective bargaining agreement authorizing union-procured employment discharges of farm workers not for failure to pay dues, assessments, or initiation fees, but for failure to support a union's ideological goals and its tactical weapons for achieving those goals.

PARTIES

This Jurisdictional Statement is filed on behalf of appellant, Maria Guadalupe Navarro. Appellees are the Agricultural Labor Relations Board (ALRB) and the United Farm Workers of America, AFL-CIO (UFW). In the proceedings below, appellant's case was consolidated with three other cases. The other parties not mentioned in the caption to this Jurisdictional Statement were farm workers Severo Pasillas, Juan Martinez, and Odis Scarbrough. The four consolidated actions were *Pasillas v. Agricultural Labor Relations Board, United Farm Workers* (Civ.

No. A021137), *United Farm Workers v. Agricultural Labor Relations Board* (two cases, Civ. Nos. A021199 and A021200), and *Navarro v. Agricultural Labor Relations Board, United Farm Workers* (Civ. No. A021202).

Appellant, Maria Guadalupe Navarro, appeals from the decision and judgment of the California District Court of Appeal, First Appellate District, entered May 24, 1984 (rehearing denied, June 20, 1984), affirming and modifying the December 30, 1982, decision of the California Agricultural Labor Relations Board, following the termination of Ms. Navarro's employment under the provisions of California Labor Code § 1153(c).

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On Appeal from the California Court of Appeal, First Appellate District

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The decision of the California Agricultural Labor Relations Board is reported at 8 A.L.R.B. No. 104 (Dec. 30, 1982), and appears as Appendix A to this Jurisdictional Statement. The opinion of the California Court of Appeal, First Appellate District, is reported at 156 Cal. App. 3d 312 (1984), and appears as Appendix B to this Jurisdictional Statement. The California Court of Appeal, First Appellate District, issued a denial without opinion of appellant's petition for rehearing and it appears as Appendix C to this Jurisdictional Statement. The California Supreme Court issued a summary denial of appellant's petition for hearing and it appears as Appendix D to this Jurisdictional Statement.

JURISDICTION

The final order of the California Supreme Court denying appellant's petition for hearing was entered August 8, 1984. Appendix D. Notice of appeal to the District Court of Appeal, with copy to the California Supreme Court, was filed October 23, 1984. Appendix E. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(2). Appellant has at all times throughout the course of the proceedings below maintained that California Labor Code § 1153(c) is invalid because of its repugnance to the First and Fourteenth Amendments of the United States Constitution, whereas the final decision of the California District Court of Appeal upholds its validity.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First and Fourteenth Amendments to the United States Constitution are set forth in Appendix F; California Labor Code § 1140.2 is set forth in Appendix G; California Labor Code § 1152 is set forth in Appendix H; California Labor Code § 1153(c) is set forth in Appendix I; California Labor Code § 1154(a)(1) and (b) is set forth in Appendix J; California Labor Code § 1160.3 is set forth in Appendix

K; California Labor Code § 1160.8 is set forth in Appendix L; and California Labor Code § 1165(a) is set forth in Appendix M.

STATEMENT OF THE CASE

This case involves the fundamental right of an individual to pursue a livelihood, and whether the state can sanction interference with that right to work through the abridgment of the right of association and right to be free from discriminatory application of the law as otherwise guaranteed through the First and Fourteenth Amendments to the United States Constitution.

This is not a case where the right of workers to associate and form unions is at stake, for all parties to this dispute are in agreement that workers are and must continue to be afforded the right to organize. Rather, this case raises for the first time the issue of whether a state can become a party to the imposition of economic capital punishment upon a worker solely on the grounds that a worker wishes not to associate but rather wishes to work unencumbered by forced adherence to unwelcome associations and ideologies. Nor is this a case where the lack of payment for legitimately provided union services is at stake for so-called fair share payments are not at issue. Rather, this case asks one compelling and fundamental question: whether appellant, Ms. Maria Guadalupe Navarro, can be forced to give up fundamental constitutional rights in order to pursue her right to work.

This case relates back to 1979. Appellant, Maria Guadalupe Navarro, was a California farm worker. She also was a member of a labor union, the United Farm Workers of America, AFL-CIO, not because of choice, but because she could not work for her employer unless she was in fact a union member. This relationship was, and still is, sanctioned and authorized by Section 1153(c) of the Labor Code which permits labor unions and employers to enter into collective bargaining agreements which contain union

security agreements. Such a union security agreement calls for the employer to fire a farm worker from her job if the union for whatever reason finds that worker to no longer be in good standing with the union.

After the expiration of the collective bargaining contract, UFW commenced a strike against appellant's employer, Growers Exchange, Inc., in January, 1979. The strike was bitterly contested and lasted over 11 months, continuing until a new agreement was reached on December 21, 1979. The new contract contained a union security clause as authorized under Labor Code § 1153(c). Appendix N. In July, 1979, appellant was forced to return to her job because of economic necessity. She worked at her job continually thereafter until November 26, 1980, when UFW succeeded in having her fired under the terms of the union security provision in the new contract. Thereafter, Ms. Navarro commenced legal action in defense of her fundamental rights to pursue her lawful occupation, to freedom of association, and to equal protection of the laws.

Appellant filed unfair labor practice charges against the United Farm Workers on January 16, 1981, alleging violations by the UFW of Labor Code § 1154(a)(1) and 1154(b). Appendix J. At a prehearing conference held May 14, 1982, it was agreed by all parties to waive the evidentiary hearing before an administrative law officer, and accordingly the case was submitted directly to the full California Agricultural Labor Relations Board for resolution. In her opening brief, appellant squarely placed before the board the constitutionality of Labor Code § 1153(c). Appellant argued that if Labor Code § 1153(c) were read to authorize the execution of a collective bargaining agreement requiring that employees become and remain formal union members and that they remain in good standing as formal members, over and above the requirement that they pay initiation fees, dues, and assessments, or face loss of job as penalty for noncompliance, the employee's constitutional

rights to association would be flagrantly violated. She further argued that if formal union membership were approved and sanctioned by Section 1153(c) it would discriminate against farm workers who do not wish to be formal members of a union, but still desire to work for a grower who has signed a contract with a union security provision. A formal union membership requirement would thus constitute a denial of equal protection under the Fourteenth Amendment to the United States Constitution.

The gravamen of appellant's due process and equal protection arguments was that Labor Code § 1153(c) failed to pass the strict scrutiny standard of review this Court has required where fundamental rights and personal liberty guarantees of the First Amendment are abridged by legislative enactment. The board's decision of December 30, 1982, 8 A.L.R.B. No. 104 (Appendix A) found that the United Farm Workers had violated appellant's procedural due process rights and thereby committed the unfair labor practices charged by appellant. The decision did not reach her constitutional arguments.[1]

Appellant, therefore, on January 27, 1983, filed a petition for writ of review of the board's decision in the California District Court of Appeal, First Appellate District. In her arguments before the California appellate court, appellant reiterated that the subject of the controversy was the

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[1]However, in a companion case, *Severo Pasillas, Juan Martinez, and Odis Scarbrough*, 8 A.L.R.B. No. 103 (1982), Appendix P, decided the same day, the board made clear its assessment of the reach and constitutionality of Labor Code § 1153(c):

> "Labor Code § 1153(c) gives a labor organization representing agricultural employees the right, under a union security agreement, to require those employees to become and remain members of the union in good standing as a condition of continued employment . . . . We believe, however, that Section 1153(c) comports with the constitutional standards articulated in numerous cases by the United States Supreme Court and the California Supreme Court." *Id.* at 7-8.

constitutionality of Labor Code § 1153(c) and raised once again the failure of Labor Code § 1153(c) to pass strict scrutiny review in its impact upon fundamental rights and guaranteed associational freedoms. The United Farm Workers cross-petitioned before the same court, and the court issued its writ on January 18, 1984. In its decision filed May 24, 1984, the Court of Appeal substantially refused to reach appellant's constitutional arguments. Initially the court found that retroactive application of union security agreements, impermissible under the National Labor Relations Act (NLRA), was valid under the Agricultural Labor Relations Act.[2] The Court of Appeal further ruled that it need not decide whether Ms. Navarro's constitutional rights were violated by the operation of the union security agreement under Section 1153(c) because it could find no "state action." However, the court did rule that once a union attempts to procure an employee's discharge under a Section 1153(c) union security agreement, the board must evaluate whether it is reasonable to cause the discharge in light of the severity of the transgression committed by the employee. The Court of Appeal nevertheless upheld the validity of Ms. Navarro's discharge under Section 1153(c).

Appellant filed a timely petition for rehearing before the Court of Appeal on June 7, 1984, raising once again her constitutional arguments. This petition was denied without comment on June 20, 1984. Appendix C. Appellant then filed a petition for hearing before the California Supreme Court on July 3, 1984, which was also summarily denied on August 8, 1984. Appendix D. Throughout the course of this litigation below, appellant has maintained and argued that

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[2]This finding was necessary since the conduct for which appellant was deprived of her livelihood occurred when no contract, and hence no contractually-based union security duties and corresponding rights, between the United Farm Workers and her employer, was in existence.

Section 1153(c) of the Labor Code, as interpreted by the California Agricultural Labor Relations Board and the courts of the State of California, is unconstitutional because it requires the abridgment of fundamental rights and First Amendment associational freedoms in a manner that cannot pass this Court's strict scrutiny analysis for such enactments. Appellant now comes before this Court seeking vindication of her constitutional right to be free of the unlawful deprivation of her fundamental rights of associational freedom and of pursuit of her lawful occupation.

SUBSTANTIALITY OF THE FEDERAL QUESTION

The protection in the work place of American workers' First Amendment associational rights and other fundamental rights has received this Court's closest attention. *See, e.g., International Association of Machinists v. Street,* 367 U.S. 740 (1961), *Abood v. Detroit Board of Education,* 431 U.S. 209 (1977). This solicitude should be extended equally to agricultural workers who must pursue their employment under state laws that threaten to undermine the delicate policy accommodations that underlie national labor legislation. No segment of the American work force ought to be subjected to "economic capital punishment" for exercising rights enjoyed and taken for granted by the vast majority of workers covered by collective bargaining agreements.

Appellant contends that Labor Code § 1153(c), a significant aspect of the California Agricultural Labor Relations Act of 1975 (ALRA), requires just such economic capital punishment by authorizing agricultural labor organizations to deprive agricultural workers of their jobs for asserting and exercising their First Amendment associational rights and their fundamental rights to pursue their livelihoods. Thus a substantial question is raised under the United States Constitution for which this Court should order full briefing and argument on the merits.

ARGUMENT

I

THE OPERATION OF A STATE STATUTE WHICH SANCTIONS A UNION SECURITY AGREEMENT CALLING FOR FARM WORKERS TO LOSE THEIR JOBS FOR SIMPLY EXERCISING THEIR FUNDAMENTAL, CONSTITUTIONAL RIGHTS CONSTITUTES STATE ACTION

A state cannot be a party to the deprivation of individual rights in derogation of the United States Constitution. Rather, a state must be a stalwart protector of individual liberties. Regrettably, this has not been the experience in this case now before this Court. Rather, the state has been a vital participant in the deprivation of certain of the appellant's fundamental, constitutionally protected liberties. The State of California has been an active participant, rather than a mere witness, to such deprivation as manifested by the following unequivocal reasons: (1) by virtue of the rule of *Shelley v. Kraemer,* 334 U.S. 1 (1948); (2) by analogy to the presence of state action found under federal labor legislation; and (3) by virtue of the close nexus that exists between a union and the California Agricultural Relations Board in the operation of Section 1153(c) union security agreements.

A. State Action Is Present Under a Shelley v. Kraemer Analysis

In *Shelley v. Kraemer, supra,* this Court found state action in the enforcement of private racially restrictive covenants by the state courts of Missouri and Michigan. The Court noted that constitutional protections could not attach to the private covenants themselves, so long as the parties voluntarily adhered to them. *Id.* at 13. But when the courts themselves undertook to effectuate the impairment of plaintiff's fundamental rights to equal protection of the laws, state action was present. *Id.* at 19.

In like manner, the administrative and judicial processes authorized and created by the ALRA for the furtherance of union security agreements entered into under Section 1153(c) bring into play the "full panoply of state power" the *Shelley* court found persuasive.[3] *Id.* at 19. The unfair labor practice jurisdiction of the board with its far-reaching make-whole remedy power (Labor Code § 1160.3, Appendix K) brings to bear the "full coercive power of government," *Shelley*, 334 U.S. at 19, for the protection and support of union security agreements. Since state action "refers to exertions of state power *in all forms*," *Shelley*, 334 U.S. at 20 (emphasis added), the statutory cause of action for actual breach of contract granted at Labor Code § 1165(a) (Appendix M) must also be reckoned as state action in support, encouragement, and protection of union security agreements embodied as contractual terms within labor contracts. Judicial enforcement of board orders declaring unfair labor practice violations relating to union security agreements is, of course, classically within the *Shelley* principle. *See* Labor Code § 1160.8. Appendix L (*inter alia*, court jurisdiction of board enforcement actions granted). Thus, the California Agricultural Labor Relations Act creates administrative and judicial mechanisms for protection of union security agreements which clearly constitute "state action" under *Shelley*.

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[3] *Cf. Hughes Tool Company*, 147 N.L.R.A. 1573, 1577 (1961):

"First, the separate opinion disregards certain *constitutional limitations* upon the board's powers . . . . Specifically, we hold that the board cannot validly render aid under Section 9 of the Act to a labor organization which discriminates racially when acting as a statutory bargaining representative. *Cf. Shelley v. Kraemer*, 334 U.S. 1 (1948); *Hurd v. Hodge*, 334 U.S. 24 (1948); *Bolling v. Sharpe*, 347 U.S. 497 (1954)." (Emphasis added.)

B. State Action Is Present in the Operation of Union Security Agreements Created Under Federal Labor Legislation

In 1955 this Court found state action where the opportunity for a union shop union security agreement was commanded by federal statute. *Railway Employes' Department, American Federation of Labor, International Association of Machinists v. Hanson,* 351 U.S. 225 (1955). In *Hanson,* the federal statute expressly overrode the local (Nebraska) right to work statute that forbade both closed and union shop union security agreements. In recent cases, however, federal courts have invoked no such preemption limitation, whereby a federal statute must completely oust existing state law or policy, in order to find state action. In *Linscott v. Miller Falls Company,* 440 F.2d 14 (1st Cir. 1971), the union security agreement entered into under the provisions of the National Labor Relations Act, did not expressly override contrary state legislation yet the court found state action in the sanctions created by the Act:

> "What the cited cases mean, in terms of the present case, is that if the company declined to discharge the plaintiff, *the union could institute a federally supported suit, if not an unfair labor practice charge,* for failure to live up to its bargaining agreement . . . . We know of no principle that measures governmental action by the frequency or infrequency of its exercise. *In the case at bar the union's demand that the plaintiff be discharged is as federally supported as was the similar demand in Hanson.*" *Id.* at 17 (emphasis added).[4]

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[4]Contrary federal case law does exist, however. The disagreement and disarray among the circuits on this question is indicated by the fact that the following cases found no state action in the operation of union security agreements under the provisions of NLRA, *Reid v. McDonnell Douglas Corporation,* 443 F.2d 408 (10th Cir. 1971); *Kolinske v. Lubbers,* 712 F.2d 471 (D.C. Cir. 1983); *Hovan*

This is precisely the situation created under Section 1153(c) of the Labor Code.

The ultimate basis for the decisions finding state action under the nonpreemptive NLRA as well as the preemptive Railway Labor Act (RLA) is that articulated by Justice Douglas in his dissent from the denial of certiorari in *Buckley v. American Federation of Television and Radio Artists:*

> "When Congress authorizes an employer and a union to enter into union-shop agreements and makes such agreements binding and enforceable over the dissents of a minority of employees or union members, it has cast the weight of the Federal Government behind the agreement just as surely as if it had imposed them by statute." 419 U.S. 1095 (1974).

A "congressional imprimatur," *Lykins,* 510 F. Supp. at 25, is placed on such union security agreements regardless of their preemptive or nonpreemptive character, and state action is thus established.[5] The State of California has

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v. United Brotherhood of Carpenters and Joiners of America, 704 F.2d 641 (1st Cir. 1983). There are other cases which do find such state action, *Hammond v. United Papermakers and Paperworkers Union,* 462 F.2d 174 (6th Cir. 1972), and *Seay v. McDonnell Douglas Corp.,* 427 F.2d 996 (9th Cir. 1972). The following District Court cases also find state action in NLRA union security agreement operations: *Beck v. Communication Workers of America,* 468 F. Supp. 93 (D. Md. 1979); *Lykins v. Aluminum Workers International Union,* 510 F. Supp. 21 (E.D. Pa. 1980); *Havas v. Communication Workers of America,* 509 F. Supp. 144 (N.D.N.Y. 1981).

[5]The demise of the preemptive/nonpreemptive distinction has recently received further corroboration from this Court's decision in *Ellis v. Brotherhood of Railway, Airline and Steamship Clerks,* 52 U.S.L.W. 4499 (Apr. 25, 1984). In that case constitutional protections were invoked by this Court against a union security agreement entered into under the Railway Labor Act in California, which has no right to work law for the RLA to override. The congressional imprimatur was present because federal approval and enforcement were present as *Linscott* had foretold. The same logic supports a state action finding in the operation of union security agreements entered into under California Labor Code § 1153(c).

likewise placed its legislative imprimatur on Labor Code § 1153(c).

C. State Action Is Present Because a Close Nexus Exists Between a Union and the California Agricultural Relations Board in the Operation of Union Security Agreements Under Labor Code § 1153(c)

In *Jackson v. Metropolitan Edison Company,* 419 U.S. 345, 351 (1974), this Court stated that state action is present when there is "a sufficiently close nexus between the state and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the state itself." More than a mere nexus exists when the California Agricultural Labor Relations Board approves a loss of employment procured under Labor Code § 1153(c); a real fusion of interests and responsibility occurs.

In *J. Jesus R. Conchola,* 6 A.L.R.B. No. 16 (1980), Appendix O, the board quoted from the legislative history of Section 1153(c) in which then-California Assemblyman Howard Berman and then-State Secretary of Agriculture and Services Rose Bird testified to the enormous increase in intrusive power granted to the board in determining a union's "reasonableness" when acting pursuant to a Section 1153(c) union security agreement. Secretary Bird's statements are especially revealing:

> "[This section] gives to the Board the power to look into the internal workings of every labor organization that files under this Act and has any kind of activity wherein there is a complaint lodged against the labor organization because they are asking one of their members to do something that does not comport with fairness and due process. *Now, that is a tremendous power that labor organizations traditionally have never been willing to give up and have never been willing to give to a board and, in effect, this language is giving to the board that power . . . .*" *Id.* at 13-14,

citing Hearings on Senate Bill No. 1 before the Senate Industrial Relations Committee on May 21, 1975, at 71-72 (emphasis in original; emphasis added); *Pasillas v. Agricultural Labor Relations Board,* 156 Cal. App. 3d 323 (1984), Appendix O.

The California Court of Appeal in its opinion finding no state action refused appellant Navarro's constitutional claims and explored some of the ramifications of this new relationship between the board and union. The board's reasonableness inquiry under Section 1153(c) is intended to "[bridle] union membership standards" and give directly to the board "intrusive powers of review over internal disciplinary matters," *Pasillas v. Agricultural Labor Relations Board,* 156 Cal. App. 3d at 350, Appendix B at B-43, so that the board could " 'look into their [union's] internal organization and their internal workings . . . .' " *Id.* at 354, Appendix B at B-48. The board in making its reasonableness determination as required by Section 1153(c) is not limited to requiring mere "mechanical compliance" with due process standards, but must scrutinize the "substantive fairness" of termination decisions, and where the process is found deficient it must "impose those [needed] protections." *Id.* at 355, Appendix B at B-49-50. The board will determine the "exact parameters" of acceptable union procedures and explanations for union security terminations. *Id.* at 355, Appendix B at B-50. And the board will have to repeat this process on a case-by-case basis, *id.,* as each Section 1153(c) termination raises its specific "factual variations." *Id.* at 353, Appendix B at B-47.

Under this process the board clearly directs and approves the union's dismissal process. How important was the employee's infraction to the union? The board decides. *Id.* at 356, Appendix B at B-51. Are there mitigating factors reducing the employee's culpability? The board decides. *Id.* Can the union impose a less severe sanction

and still achieve its goals? The board decides.[6] *Id.* Thus, the union's discharge decision process has become so entwined with governmental policies and so impregnated with a governmental character that the constitutional limitations on state action must apply. *See Evans v. Newton,* 382 U.S. 296, 299 (1966) (municipality may not act as testamentary trustee of racially segregated park without constitutional scrutiny). *See also Jeffries v. Georgia Residential Finance Authority,* 678 F.2d 919 (11th Cir. 1982) (superintendency by state housing finance agency of tenancy termination decisions "facilitates, encourages, or authorizes" such terminations sufficiently to show state action).

The nexus between union and board in making union security agreement terminations is unmistakable. The board is a joint participant in every Section 1153(c) invocation of union security agreement termination power. This joint participation is inevitable. The ALRA tries to give full play to union prerogatives in the union security enforcement area by authorizing the procurement of employee terminations for a breach of internal union discipline, while, through the intricate processes of the court-mandated reasonableness determination, at the same time it attempts to protect agricultural workers' fundamental associational and livelihood rights. The attempt to simultaneously expand union termination prerogatives and to protect with completeness and precision workers' fundamental rights creates a nexus of interdependence, joint participation, and commingling of public and private acts that bears the clear indicia of state action under the *Jackson* test.

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[6]The court in effect created at least 11 separate nexus factors transferring the union's decision-making role to the board. *See id.*

II

IN THE PRESENCE OF STATE ACTION LABOR CODE § 1153(c) VIOLATES FREEDOM OF ASSOCIATION AND THE FUNDAMENTAL RIGHT TO EMPLOYMENT

The Court of Appeal's interpretation of Section 1153(c) clearly violates a farm worker's fundamental constitutional right to freedom of association and to pursue the lawful occupation of her choice. *Truax v. Raich,* 239 U.S. 33 (1915). The Court found that Labor Code § 1153(c) authorizes the execution of a collective bargaining agreement which calls for a farm worker to be fired if she does not comply with union membership requirements over and above the requirement to pay initiation fees, dues, and assessments. *Pasillas v. Agricultural Labor Relations Board,* 156 Cal. App. 3d at 339-49. By the court's ruling appellant herein must subordinate her ideological beliefs and convictions to those of her union or face the loss of her job. The Court of Appeal thus lost sight of the United States Constitution's overall protection of such fundamental liberties.

The Court of Appeal read Section 1153(c) of the Labor Code to authorize the execution of a collective bargaining agreement requiring that employees become and remain formal union members and that they remain in good standing as formal members over and above the requirement that they pay initiation fees, dues, and assessments, or face loss of job as penalty for noncompliance. *Pasillas v. Agricultural Labor Relations Board,* 156 Cal. App. 3d at 339-49. Exhibit B at B-25-41. Under this interpretation, the employees' fundamental constitutional rights to freedom of association and to pursue their legitimate occupations are violated.

Among the individual rights protected by the First Amendment is the freedom of association. *National Association for the Advancement of Colored People v. State of*

Alabama ex rel. Patterson, 357 U.S. 449 (1958). *See also Abood v. Detroit Board of Education,* 431 U.S. 209, 233 (1977). That freedom includes its converse, the freedom *not* to associate, the right *not* to be compelled to join a group or association against one's will, and the right *not* to be required to associate with groups holding views which an individual regards as opposed to his own. *Gavett v. Alexander,* 477 F. Supp. 1035, 1045 (D.C.D.C. 1979); *Good v. Associated Students of the University of Washington,* 86 Wash. 2d 94, 542 P.2d 62 (1975); *cf. Wooley v. Maynard,* 430 U.S. 705, 714 (1977).

First Amendment rights are among the most fundamental interests. *Police Department of the City of Chicago v. Mosley,* 408 U.S. 92, 101 (1972). The degree of importance attached to these associational interests by this Court was ably stated by Justice Powell in *Abood v. Detroit Board of Education.*

> "Our decisions establish with unmistakable clarity that the freedom of an individual to associate for the purpose of advancing beliefs and ideas is protected by the First and Fourteenth Amendments. The appellants argue that they fall within the protection of these cases because they have been prohibited, not from actively associating, but rather from refusing to associate.
>
> . . . .
>
> " . . . For at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State. . . .
>
> "These principles . . . are no less applicable to the case at bar, and they thus prohibit the appellees [the union] from requiring any of the appellants to contribute to the support of an ideological cause he may

> oppose as a condition of holding a job as a public school teacher." *Abood,* 431 U.S. at 233-35 (citations omitted).

Thus the court has made clear that it will give its closest scrutiny to legislative impingements upon First Amendment associational interests. This "strict scrutiny" analysis requires that legislation pass the following extremely high standards: (1) the law must serve a compelling governmental interest, and (2) it must do so by the means least intrusive upon the rights of a charging party. *Dunn v. Blumstein,* 405 U.S. 330, 335 (1972). As further refined by the *Abood* Court, this test requires that

> "'[t]he [governmental] interest advanced must be paramount, one of vital importance, and the burden is on the government to show the existence of such an interest. . . . [C]are must be taken not to confuse the interest of partisan organizations with governmental interests. Only the latter will suffice. Moreover, . . . the Government must "emplo[y] means closely drawn to avoid unnecessary abridgment."'" *Abood,* 431 U.S. at 259-60 (citations omitted).

Application of this standard to the abridgment of appellant's First Amendment associational rights by the operation of union security agreements under Labor Code § 1153(c) demonstrates the manifest unconstitutionality of that section.

The compelling governmental interests hypothetically to be served by the authorization of union security agreements under Labor Code § 1153(c) are identified at Labor Code § 1140.2. Appendix G. This section clearly identifies the compelling interests of the State of California in strongly enunciated organizational rights for its agricultural workers. The interests of a state in the free expression of employees' organizational rights and the hoped-for concomitant labor peace that follows thereupon are indeed compelling interests. But the inquiry may not stop here, for

a two part examination of the questioned legislation is required. Not only must compelling governmental interests be served, admittedly the case here, but also the legislation serving compelling governmental interests must pass the second prong of the *Dunn/Abood* articulation of the strict scrutiny test. Here Labor Code § 1153(c) is clearly deficient.

Labor Code § 1153(c) expressly authorizes the negotiation of union security contracts whereby employees who lose good standing in their union are to be fired from their jobs. A "good standing" requirement, essentially a shorthand term for requiring associational conformity with its attendant burdens on personal action and ideological independence, has here been grafted onto the terms under which agricultural workers may continue to peacefully hold their jobs. Thus, this good standing status requires much more than that level of member support necessary to maintain collective bargaining activities. It requires formal membership and obedient conformity to union ideological pursuits, not simply the payment of initiation fees and dues. A farm worker's acute family needs, her heartfelt reservations about collective goals and the appropriateness or inappropriateness of the manner in which others have decided they will be pursued receive *no protection* under this scheme. The employee must remain a "member in good standing," as she is not free to resign from the union and simply contribute financially. In order for an employee to retain her job, she is forced to associate with the conditions of membership set by the union.

Labor Code § 1153(c) thus requires unionized farm workers to remain formal members of a labor organization even if they find the activities of this organization repugnant to their personal values and beliefs. Assuming that UFW provides collective bargaining and representational services of value to appellant, a collective bargaining agreement negotiated under Section 1153(c) nevertheless forecloses petitioner from employment if she only agrees to pay for the costs of those services. There is thus mani-

fested by Section 1153(c) not merely the desire to avoid collective bargaining free riders. Appellant was never afforded an opportunity to demonstrate her willingness to pay for those services she actually received. Rather, Section 1153(c) intends to effectuate, and does so effectuate, associational conformity far beyond a union's need to recapture its assets faithfully expended on collective bargaining activities. Quite simply, appellant was required to adhere to all the incidents of formal union membership in contravention of her personal associational desires and rights.

Clearly, this pernicious impact of Section 1153(c) is that same impact Congress sought to eliminate by Section 8(a)(3) of the Taft-Hartley Act of 1947, 29 U.S.C. § 158(a)(3). It was "the desire of Congress to reduce the evils of compulsory unionism while allowing financial support for the bargaining agent." *National Labor Relations Board v. General Motors Corp.*, 373 U.S. 734, 744 (1963). Congress eliminated the evil of mandating a worker to conform to union ideological viewpoints rather than personal viewpoints and thus gave life to the worker's fundamental rights to association and to work.

In contrast, Ms. Navarro's fundamental rights have been held captive by Section 1153(c) and, consequently, the section must fall. Appellant has acknowledged the compelling character of the governmental interests identified as underlying California Labor Code § 1140.2. In essence, the purpose of the ALRA is to promote the right of agricultural employees to full freedom of association and self-organization through collective bargaining. The obvious purpose was to allow workers to unionize for bargaining strength and to promote peace in the fields. But Section 1153(c) fails the second critical prong of the *Dunn/Abood* strict scrutiny inquiry. Here California has not drawn Section 1153(c) to avoid *unnecessary* abridgment of appellant's First Amendment associational rights.

The record is clear and this Court can take judicial notice of the fact that union security provisions under the NLRA, which do not require formal union membership and adherence to union ideologies, have fulfilled the purposes of providing organized labor collective bargaining rights, and maintaining peace at the worksite. Thus, federal labor legislation (and state agricultural labor legislation as well, *see* Footnote No. 8, *infra*) has recognized labor's legitimate desire to negotiate union security agreements. But it has also recognized that union security agreements exist at the most sensitive point of intersection between workers' *collective* organizational rights and workers' *individual* associational rights, and has drawn a line that protects collective interests and individual associational interests, as well.

Labor Code § 1153(c) has failed its duty to realistically recognize and strike this most sensitive balance. The ALRA has simply chosen to disregard the individual First Amendment associational freedoms of California agricultural workers in deference to compelling organizational needs. But NLRA experience under Section 8(a)(3), 29 U.S.C. § 158(a)(3), demonstrates there is no way to substantiate a finding that mandatory formal union membership is the least drastic means of achieving compelling governmental interests without infringing workers' First Amendment associational rights. Furthermore, *Abood* strongly supports the finding that employees' First Amendment rights are abridged when individual employees are forced to identify themselves with the activities, goals, and policies of a labor organization, even when that identification is limited to financial support. Just as compulsory financial support of union political and ideological goals and activities violates employees' constitutional rights, the greater associational involvement demanded by a formal membership requirement even more clearly abridges those fundamental constitutional guarantees. If the requirement of formal membership is imposed by ALRA, the concomitant associational

burden is unconstitutional. *See also Good v. Associated Students of the University of Washington, supra.*

Labor Code § 1153(c) must also fall because of its impermissible impact on appellant's fundamental right to pursue her livelihood. *See Truax v. Raich,* 239 U.S. 33 (1915). Certainly the same compelling interests are present under this fundamental rights inquiry as were present under the earlier First Amendment analysis. And similarly, Section 1153(c) is not closely drawn so as to minimize its impact on this right. Just the contrary. Section 1153(c) is drawn to exact the maximum of union conformity by directly penalizing this right. Where compelling governmental interests are effectuated by an unnecessarily overbroad impact on fundamental rights, the offending legislation must fall. *Dunn, supra; Abood, supra.*

Finally, the Court of Appeal's ruling that mandatory formal union membership is approved and sanctioned in Labor Code § 1153(c) impermissibly discriminates against the farm worker who does not want to be a formal union member, but still needs to work for a grower who has signed a contract with a union security provision. Labor Code § 1153(c) thus creates a classification among California agricultural workers deriving from their possession, or lack thereof, of union "good standing" based on the requirements of formal union membership. Those agricultural workers with "good standing" whose personal ideologies conform to formal membership requirements suffer no infringements of fundamental associational and occupational rights. But agricultural workers whose personal benefits do not conform run afoul of the union's internally generated formal membership requirements, lose their "good standing," and are deprived of First Amendment associational rights and the fundamental right to pursue their legitimate occupations.

When fundamental rights are impacted by a statute, in order for the statute to be constitutionally valid under the Equal Protection Clause of the Fourteenth Amendment,

the state must demonstrate a closely tailored and necessary relationship between the statutorily created classification and the compelling interest which justifies limiting the exercise of the fundamental rights for the impacted class. *National Association for the Advancement of Colored People v. Button,* 371 U.S. 415, 438 (1963), *Police Department of the City of Chicago v. Mosley,* 408 U.S. at 99. Labor Code § 1153(c) cannot meet this requirement. The classification of California farm workers on the basis of whether or not a farm worker has "good standing" as defined by the union is clearly not closely tailored nor strictly necessary to achieve the compelling governmental interests identified at Labor Code § 1140.2. Where such an overbroad classification impermissibly impacts fundamental associational and livelihood rights, it must fall.

As stated above, there is absolutely no support for the proposition that the compelling state interests of the Agricultural Labor Relations Act cannot be achieved without the imposition of compulsory formal union membership that abridges the fundamental rights of that class of farm workers who do not choose to be formal members. The classification thus created by Section 1153(c) is not carefully tailored and drawn to precision so that it furthers these interests while not necessarily abridging other fundamental associational or occupational interests and rights.

CONCLUSION

The federal constitutional issues raised by the effects of California Labor Code § 1153(c) on the fundamental rights to employment and association of California agricultural employees are very substantial. Furthermore, the number of California farm workers potentially subject to infringement of their associational and other fundamental employment rights under labor Code § 1153(c) is staggering. Seventy percent of California's $14 billion agricultural

production is produced by this state's 223,000 hired agricultural workers.[7] By way of contrast, the three other states that have enacted comprehensive agricultural labor legislation have not seen fit to restrict their farm workers' rights as has California under Labor Code § 1153(c).[8] The importance of this issue, its wide impact on a large segment of American workers, and the clear divergence of Labor Code § 1153(c) from the norms of labor legislation on both state and federal levels all counsel that this case should be noted for probable jurisdiction, with full briefing and argument on the merits.

Respectfully submitted,

Of Counsel:
JAMES S. BURLING
Pacific Legal Foundation
455 Capitol Mall, Suite 600
Sacramento, CA 95814
Telephone: (916) 444-0154

RONALD A. ZUMBRUN
ROBIN L. RIVETT
Counsel of Record
Pacific Legal Foundation
555 Capitol Mall, Suite 350
Sacramento, CA 95814
Telephone: (916) 444-0154
Attorneys for Appellant

(Appendices follow)

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[7]United States Department of Labor, *Monthly Labor Review* 27-31 (September, 1983).

[8]*Cf.* Ariz. Rev. Stat. Ann. § 23-1385(a)(3); Idaho Code § 22-4106(3); Kan. Stat. Anno. § 44-828(b)(3).

Appendix A

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

Case No. 81-CL-1-SAL

8 ALRB No. 104

Salinas, California

UNITED FARM WORKERS OF AMERICA, AFL-CIO,

Respondent,

and

MARIA GUADALUPE NAVARRO,

Charging Party.

DECISION AND ORDER

Pursuant to California Administrative Code, title 8, section 20260, Charging Party Maria Guadalupe Navarro (Ms. Navarro), Respondent United Farm Workers of America, AFL-CIO (UFW), and the General Counsel have submitted this matter to the Agricultural Labor Relations Board (Board) by way of a stipulation of facts and have waived an evidentiary hearing. Each party filed a brief[1] on the legal issues, which concern the interpretation and application of the so-called "good standing" provision in

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[1]The UFW's motion to strike a large portion of Ms. Navarro's brief is hereby denied, as we find the arguments made therein are germane to the issues raised by the complaint and the answer.

Labor Code section 1153(c) of the Agricultural Labor Relations Act (Act).[2]

The facts stipulated by all parties herein are as follows: the UFW is a labor organization within the meaning of the Act. At all times relevant herein, Ms. Navarro was an agricultural employee within the meaning of the Act, employed by Growers Exchange, Inc. (Growers Exchange). From January 1979 through December 1979, the UFW was on strike against Growers Exchange.

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[2]Labor Code section 1153(c) states that, "It shall be an unfair labor practice for an agricultural employer . . . .":

> By discrimination in regard to the hiring or tenure of employment, or any term or condition of employment, to encourage or discourage membership in any labor organization.
>
> Nothing in this part, or in any other statute of this state, shall preclude an agricultural employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this section as an unfair labor practice) to require as a condition of employment, membership therein on or after the fifth day following the beginning of such employment, or the effective date of such agreement whichever is later, if such labor organization is the representative of the agricultural employees as provided in Section 1156 in the appropriate collective-bargaining unit covered by such agreement. No employee who has been required to pay dues to a labor organization by virtue of his employment as an agricultural worker during any calendar month, shall be required to pay dues to another labor organization by virtue of similar employment during such month. For purposes of this chapter, membership shall mean the satisfaction of all reasonable terms and conditions uniformly applicable to other members in good standing; provided, that such membership shall not be denied or terminated except in compliance with a constitution or by-laws which afford full and fair rights to speech, assembly, and equal voting and membership privileges for all members, and which contain adequate procedures to assure due process to members and applicants for membership.

In the month of January, 1979, agricultural employees of Growers Exchange who were UFW members drafted and adopted uniform rules of conduct regarding the strike. Ms. Navarro, a member of the UFW, was aware that a strike was in progress against Growers Exchange, and was also aware that the UFW had a rule prohibiting its members from working for the struck employer during the strike. Nevertheless, from early July through October 1979, Ms. Navarro crossed UFW picket lines to work at Growers Exchange. On or about December 21, 1979, the UFW and Growers Exchange entered into a collective bargaining agreement which provided, inter alia, that employees were required to maintain UFW membership in good standing as a condition of continued employment, and that any member found by the UFW not to be in good standing was to be immediately discharged or suspended by Growers Exchange upon written request from the UFW.

On February 28, 1980, the president of the UFW extended by four months the period within which trials of members who allegedly violated the strike rules at Growers Exchange could be conducted.[3] On or about May 28, 1980, the president of the UFW further extended by six months the period during which such trial could be conducted. On or about September 22, 1980, the UFW served Ms. Navarro with a notice of trial date and a charge alleging that she had violated the UFW's constitution by crossing the UFW picket line to work at Growers Exchange during the strike. Ms. Navarro's accuser, Mr. Abel Luna, was aware before October 1979 that Ms. Navarro was crossing the UFW picket line to work at Growers Exchange. On October 1,

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[3]Article XVIII, of the UFW Constitution sets forth the Union's procedures for disciplining members. Section 8 of the article provides: "All the time periods stated in this article may be extended by the President where, in his judgment, justice will be served by such an extension."

1980, the UFW's Growers Exchange ranch community held the trial of Ms. Navarro which she did not attend, found that Ms. Navarro had crossed the picket line as charged, and decided to suspend her UFW membership for two years.

On or about October 4, 1980, the UFW served Ms. Navarro with the Notice of Trial Decision and Notice of Appeal. On November 24, 1980, she appealed the UFW ranch community's decision to the UFW's National Executive Board (NEB).[4] On November 26, 1980, Growers Exchange informed Ms. Navarro by letter that the UFW had notified it that she had been suspended from membership for two years. Pursuant to the collective bargaining agreement between the UFW and Growers Exchange, Growers Exchange suspended Ms. Navarro from employment for two years.

On December 11, 1980, the UFW informed Ms. Navarro by letter that her appeal to the NEB was not accepted because it was untimely. Ms. Navarro did not file an appeal with the Public Review Board (PRB) or to the UFW's convention.[5] She filed an unfair labor practice charge against the UFW alleging that it had violated section

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[4]With respect to appeals to the NEB, Article XX, Section 1(b) of the UFW Constitution provides:

> Such written appeal must be mailed to the Secretary-Treasurer within 15 days of the date of the trial. The 15-day time limit provided in this Section for filing appeals from the decisions of trial courts may be extended at the discretion of the National Executive Board, for a period not to exceed 30 days, when the Board determines that such extension would serve the interests of justice.

[5]Article XX of the UFW Constitution permits an appeal from a decision of the NEB to either the PRB or to the next national convention following the decision of the NEB. Unlike an appeal to the NEB, an appeal to the PRB or the convention does not stay enforcement of a disciplinary penalty upheld by the NEB.

1154(b) and (a)(1) of the Act;[6] the charge was served on the UFW by mail on January 14, 1981, and filed by Ms. Navarro on January 16, 1981.

Ms. Navarro challenges the fairness and the legality of the Union's disciplinary proceedings against her for crossing its picket line and resuming employment with Growers Exchange during the strike. She argues that by failing to bring charges against her until almost a year after her alleged violation of Article XVIII, Section 1(dd) of the UFW's Constitution,[7] the Union violated Article XVIII, Section 4 of that Constitution[8] and deprived her of a reasonable opportunity to prepare a defense to the accusation on which she was to be tried. Ms. Navarro contends that the Union's subsequent suspension of her membership and its request to Growers Exchange to suspend or terminate her employment, pursuant to the union security provisions of its collective bargaining agreement with the UFW, constituted a violation of Labor Code section 1154(b) and (a)(1) of the Act.

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[6]Section 1154(b) provides that it shall be an unfair labor practice for a labor organization:

> To cause or attempt to cause an agricultural employer to discriminate against an employee in violation of subdivision (c) of Section 1153, or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated for reasons other than failure to satisfy the membership requirements specified in subdivision (c) of Section 1153.

[7]Article XVIII Section 1(dd) of the UFW Constitution provides that any member may prefer charges against another member for "working without Union authorization during the period of an approved strike for a ranch which is being struck by the Union."

[8]Article XVIII, Section 4 of the UFW Constitution provides, in pertinent part: "Charges must be preferred within 60 days of the time the accuser becomes aware of the alleged offense . . . ."

Exhaustion of Internal Union Remedies

In *UFW/Sun Harvest and Mann Packing Company* (Dec. 30, 1982) 8 ALRB No. 103,[9] we stated that we would look to the factors indicated in *Clayton v. Automobile Workers* (1981) 451 U.S. 679 in cases in which any person alleges that a labor organization has committed an unfair labor practice under the Act by restraining or coercing, or by discriminating against, an agricultural employee. That is, an aggrieved employee will ordinarily be required to exhaust union remedial procedures unless: (1) union officials are so hostile to the employee that he/she could not hope to obtain a fair hearing on his/her claim; (2) the internal procedure would be inadequate to provide the relief sought by the employee; or (3) exhaustion of internal procedures would unreasonably delay resolution of the employee's claim.

In applying section 101(a) of the Labor Management Reporting and Disclosure Act,[10] which concerns disputes between unions and union members, the federal courts

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[9]In conformance with his dissenting opinion in *UFW/Sun Harvest and Mann Packing Company* (Dec. 30, 1982) 8 ALRB No. 103, Member McCarthy would find that the disciplinary proceeding against the Charging Party was void *ab initio* because it sought to enforce an unreasonable term or condition of union membership in violation of Labor Code section 1153(c). He would otherwise concur in the majority's conclusion that procedural deficiencies rendered the proceeding invalid. The remedy ordered in this case would be the same under Member McCarthy's analysis.

[10]Section 101(a)(4) of the LMRDA provides:

> Protection of the Right to Sue. No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding, or the right of any member of a labor organization to appear as a witness in any judicial, administrative, or

have in certain extreme cases waived the requirement of exhaustion of internal union remedies, even though none of the *Clayton* factors was presented. The rationale for such a waiver is that a serious violation of a fundamental right rendered union procedures void:

> Section 101(a)(4) expressly incorporates the common law principle that a dispute between a union or other private association and one of its members should in general first be submitted to the association's own tribunals. But neither at common law nor under § 101 is this principle absolute, *Destroy v. American Guild of Variety Artists,* 286 F.2d 75, 47 LRRM 2452 (2 Cir.), cert. denied, 366 U.S. 929, 48 LRRM 2205 (1961), and included among the traditional exceptions is the situation in which the action complained of is "void." *Shapiro v. Gehlman,* 244 App.Div. 238, 278 N.Y. Supp. 785 (1935); Summers, *Legal Limitations on Union Discipline,* 64 Harv. L. Rev. 1049, 1089 (1951).
>
> Voidness is an elastic concept. Because it is tied up with the merits of the claim, its indiscriminate application could reduce the exhaustion requirement to the tautology that a plaintiff can find present relief in the courts only if his claim has legal merit. See *Summers,* op. cit. supra, at 1091. That this is a danger, however, does not mean that it is an inevitable result of applying

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legislative proceeding, or to petition any legislature or to communicate with any legislator: Provided, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof: And provided further, That no interested employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party, any such action, proceeding, appearance, or petition.

> the exception. When conceded or easily determined facts show a serious violation of the plaintiff's rights, the reasons for requiring exhaustion are absent: the commitment of judicial resources is not great; the risk of misconstruing procedures unfamiliar to the court is slight; a sufficient remedy given by the union tribunal would have to approximate that offered by the court. Where, as in this case, conceded facts show a serious violation of a fundamental right, we hold that plaintiffs need not exhaust their union remedies. (*Lubutti v. DiBrizzi* (2nd Cir. 1964) 337 F.2d 216, 219 [57 LRRM 2307].)

As fully set forth below, we find that the facts as presented in the parties' stipulation show a serious violation of Ms. Navarro's right to due process in the disciplinary proceedings against her. Accordingly, we hold that her failure to exhaust the internal remedies provided by the UFW Constitution does not warrant our deferring consideration of the issues raised by the complaint and answer in this matter.

The Denial of Due Process to Ms. Navarro

Article XVIII, section 4, of the UFW Constitution requires that a charge accusing a member of violating the union constitution "must be preferred within 60 days of the time the accuser becomes aware of the alleged offense or offenses."

Ms. Navarro's accuser, Mr. Abel Luna, became aware before October 1979, that Ms. Navarro was working at Grower's Exchange despite the strike and the picket line; but the UFW did not serve the charges and notice of trial date on Ms. Navarro until September 22, 1980, nearly one year later, and did not conduct the trial until October 1, 1980. Respondent UFW argues that it complied with the

Constitution, citing the two occasions on which UFW President Chavez extended the time within which trials of alleged strikebreakers at Growers Exchange could be held.

Article XVIII, section 8 of the UFW Constitution states that all of the time periods contained in Article XVIII may be extended by the president. However, Article XVIII refers to two different time periods: one for preferring the charge, within 60 days after the accuser becomes aware of the offense (section 4), and another for setting the time of the trial (section 6). There is no evidence that Mr. Chavez ever extended the time for preferring charges, only that he twice extended the time for holding the trials. Under the UFW Constitution, when Mr. Chavez first extended the time for holding trials of strikebreakers on February 28, 1980, that action could affect only members against whom charges had already been preferred within the required 60-day period. Therefore, as no charges had yet been preferred against Ms. Navarro, the extension could not apply to her.

A second argument by the UFW arises from a statement by Union President Chavez in a declaration made part of the record herein together with the stipulation of facts. Mr. Chavez states, "I have historically interpreted that the time requirements for filing these types of charges commence at the conclusion of the strike."

Even assuming for the sake of argument that Mr. Chavez' "interpretation" serves as an implicit "extension" of the sort allowed by Article XVIII, section 8 of the Constitution, the UFW's argument still fails. The strike at Grower's Exchange ended on December 21, 1979. The time limit for filing the charge would have begun on December 22, 1979, and expired 60 days later on February 21, 1980. As no charge was preferred against Ms. Navarro within that period, the constitutional time limitation took effect and barred later charges. The first explicit extension granted

by Mr. Chavez was on February 28, 1980, seven days after expiration of the first putative extension. Therefore, the charge that was preferred against Ms. Navarro on September 22, 1980, simply did not comport with the time limitations provided in Article XVIII, section 4 of the UFW's Constitution. Consequently, we find that the proceedings against Ms. Navarro were void. Therefore, the UFW's suspension of her union membership and its request to Growers Exchange that Ms. Navarro be discharged or suspended from its work force constituted a violation of section 1154(b) and (a)(1) of the Act.

We also reject the Union's argument that its delay in bringing charges should be overlooked because it did not prejudice Ms. Navarro, in that it enabled her to remain employed longer than would have been the case if charges had been brought and proceedings conducted sooner. This result was certainly not intended by the Union, and, even if it were, it could still hardly be said to outweigh the difficulty such a delay was likely to have caused Ms. Navarro in preparing her defense, due to the dimming of memory, the dispersion of witnesses and the loss or destruction of other kinds of evidence, which are all but inevitable when such a long period elapses between an occurrence and notice of an accusation based upon it.

As we find that the procedural deficiency of the UFW's proceedings against her relieved Ms. Navarro of the requirement that she pursue internal union remedies as a precondition to our consideration of her charge, we do not reach issues arising from her failure to appeal to the PRB or from her appeal to the NEB which was rejected as untimely. We note, however, that questions of elementary fairness are suggested by the disparity between, on the one hand, the generous extensions of time limits the Union was

willing to grant itself in bringing Ms. Navarro to trial and, on the other hand, its strict literal enforcement of the time limit for her appeal.

The Remedy

We shall order the UFW to make Ms. Navarro whole for all wage losses and other economic losses she has suffered as a result of the Union's unfair labor practice. We shall also order the UFW to reinstate Ms. Navarro to membership in good standing immediately, and to post and mail notices to employees likely to have known of the suspension of Ms. Navarro's union membership and/or the termination of her employment.

ORDER

By authority of Labor Code section 1160.3, the Agricultural Labor Relations Board (Board) hereby orders that Respondent United Farm Workers of America, AFL-CIO (UFW), its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Causing or attempting to cause Growers Exchange, Inc., or its legal successor(s) or any other agricultural employer to discriminate against any agricultural employee in violation of section 1153(c) and (a) of the Agricultural Labor Relations Act (Act), or discriminate against any such employee with respect to whom membership in the UFW has been suspended, terminated, or denied without the due process rights guaranteed by section 1153(c) of the Act.

(b) In any like or related manner restraining, or coercing any agricultural employee in the exercise of the rights guaranteed by section 1152 of the Act.

2. Take the following affirmative actions which are deemed necessary to effectuate the policies of the Act:

(a) Immediately restore Maria Guadalupe Navarro to membership in good standing in the UFW retroactive to October 1, 1980, without prejudice to her membership rights or privileges as though they had not been suspended on that date.

(b) Immediately notify Growers Exchange, Inc. or its legal successor(s) that Maria Navarro is a member in good standing and is to be deemed as such retroactive to October 1, 1980, and that the UFW requests her reinstatement to her former job or substantially equivalent employment without prejudice to her seniority and other rights or privileges of employment as though she had not been terminated on November 16, 1980.

(c) Make whole Maria Navarro for all losses of pay and other economic losses she has suffered as a result of Respondent UFW's discrimination against her, such amounts to be computed in accordance with established Board precedents, plus interest thereon, computed in accordance with our Decision and Order in *Lu-Ette Farms, Inc.* (Aug. 18, 1982) 8 ALRB No. 55.

(d) With the cooperation of Growers Exchange, Inc., or its legal successor(s) and upon request, make available to this Board and its agents, for examination, photocopying, and otherwise copying, all payroll records, social security payment records, time cards, personnel records and reports, and all records relevant and necessary to a determination, by the Regional Director, of the backpay period and the amounts of backpay due under the terms of this Order.

(e) Immediately notify Maria Navarro, by mail addressed to her last known address, of her retroactive restoration to UFW membership in good standing as provided

in paragraph 2(a) above, and of the UFW's request for her full reinstatement as communicated to Growers Exchange, Inc., or its legal successor(s), pursuant to paragraph 2(b) above.

(f) Sign the Notice to Agricultural Employees attached hereto and, after its translation by a Board agent into all appropriate languages, reproduce sufficient copies in each language for the purposes set forth hereinafter.

(g) Mail copies of the attached Notice in all appropriate languages, within 30 days after the date of issuance of this Order, to all agricultural employees employed by Growers Exchange, Inc., or its legal successor(s) at any time during the period from October 1, 1980, until the date on which the said Notice is mailed; the UFW shall seek the cooperation of Growers Exchange or its legal successor(s) in obtaining the names and addresses of the employees to whom said Notice shall be mailed.

(h) Post copies of the attached Notice in all appropriate languages, in conspicuous places at all its offices and union halls throughout the State of California for 60 days, the time(s) and place(s) of posting to be determined by the Regional Director, and exercise due care to replace any Notice which has been altered, defaced, covered or removed.

(i) With the consent of Growers, Exchange, Inc., or its legal successor(s), arrange for a representative of the UFW or a Board agent to distribute and read the attached Notice, in all appropriate languages, to all its (their) employees on company time and property, at time(s) and place(s) to be determined by the Regional Director. Following the reading, the Board agent shall be given the opportunity to answer any questions the employees may have concerning the Notice and/or their rights under the Act. The UFW shall reimburse Growers Exchange, Inc., or its legal successor(s), for the employees' wages during

this reading and question-and-answer period. The Regional Director shall determine a reasonable rate of compensation to be paid by the UFW to Growers Exchange, Inc., or its legal successor(s) and relayed by it (them) to all nonhourly wage employees in order to compensate them for time lost at this reading and during the question-and-answer period.

(j) Notify the Regional Director in writing, within 30 days after the date of issuance of this Order, of the steps Respondent has taken to comply therewith, and continue to report periodically thereafter, at the Regional Director's request, until full compliance is achieved.

Dated: December 30, 1982

ALFRED H. SONG, Chairman

HERBERT A. PERRY, Member

JEROME R. WALDIE, Member

Appendix B

[No. AO21137. First Dist., Div. Two. May 24, 1984.]

Severo Pasillas, Petitioner, v.
Agricultural Labor Relations Board, Respondent;
United Farm Workers of America, AFL-CIO et al.,
Real Parties in Interest.

[And four other cases.]*

OPINION

SMITH, J. — In these consolidated cases, we consider the extent of a union's authority under the Agricultural Labor Relations Act (Lab. Code, § 1140 et seq., hereinafter ALRA or the Act)[1] to compel a worker's discharge from employment pursuant to a "union security" provision of a collective bargaining agreement, for the worker's failure to maintain union membership in good standing. We granted the petitions of Severo Pasillas, Maria Navarro and the United Farm Workers of America (UFW or Union) to review the decisions of the Agricultural Labor Relations Board (ALRB or Board) in three related cases arising out of the Union's suspension or expulsion of four member workers for crossing picket lines to work during 1979 strikes called after expiration of prior collective bargaining agreements but before new agreements had been reached. Pursuant to union security provisions in the new agreements, the workers were fired by their employers at Union request.

[1]All subsequent section references are to the Act unless otherwise indicated.

BACKGROUND

Petitioners Pasillas and Navarro, along with two other workers, Juan Martinez and Odis Scarbrough, were all UFW members in good standing and were working for employers who were parties to collective bargaining agreements containing union security provisions. In December of 1978, those agreements expired without new agreements having been reached.[2] Navarro worked as a lettuce wrapper for Growers Exchange, Inc. (sometimes called the El Toro Company); Martinez worked as a broccoli cutter for Mann Packing Company, Inc.; and Scarbrough worked as a tractor driver for Sun Harvest, Inc. (formerly Inter-Harvest, Inc.), which was also Pasillas' most recent employer. (See fn. 2, *ante*.)

In January 1979, the UFW called strikes at Sun Harvest, Inc. (Sun Harvest) and Growers Exchange, Inc. (Growers Exchange). There were occasional work stoppages at Mann Packing Company, Inc. (Mann Packing), Martinez's employer, but no formal strike was called. Pasillas, Navarro and Scarbrough each initially respected the strikes but later crossed picket lines and returned to work before the strikes were settled. Martinez joined in all work stoppages at Mann Packing but was later accused of having crossed picket lines to work at Growers Exchange. None of the workers sought to resign from union membership.

The strikes against Sun Harvest and Growers Exchange were settled, and new collective bargaining agreements were signed with all three employers (including Mann Packing) in September and December of 1979. Each new agreement

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[2]Petitioner Pasillas, who had been working as a celery packer for Sun Harvest, Inc., elected not to travel south for the company's Oxnard celery season and so was not employed beyond the end of the Salinas celery season, which lasts from June to December.

contained a union security provision which conditioned a worker's employment on his maintaining union membership in good standing.[3] The four workers continued working for their respective employers after the new contracts took effect.

Thereafter, each worker was charged with violating union prohibitions against strikebreaking[4] and each was found guilty as charged in separate disciplinary proceedings. The discipline imposed was a two-year suspension of Navarro's membership and outright expulsion for the others. By successful internal appeals to the UFW's national executive board (NEB), Scarbrough and Martinez had their expulsions reduced to two-year and one-year suspensions, respectively. An attempted appeal by Navarro was rejected by the NEB as untimely, and Pasillas did not file an appeal. Following each worker's suspension or expulsion — and

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[3]The three union security provisions are nearly identical. The one in the Sun Harvest agreement reads as follows: "Union membership shall be a condition of employment. Each worker shall be required to become a member of Union immediately following five (5) continual days after the beginning of employment, or five (5) days from the date of the signing of this Agreement, whichever is later; and to remain a member of the Union in good standing. Union shall be the sole judge of the good standing of its members. Any worker who fails to become a member of the Union within the time limit set forth herein, or who fails to pay the required initiation fee, periodic dues or regularly authorized assessments as prescribed by Union, or who has been determined to be in bad standing by the Union pursuant to the provisions of the Union's constitution, shall be immediately discharged or suspended upon written notice from the Union to the Company [Sun Harvest], and shall not be re-employed until written notice from the Union to the Company of the worker's good standing status."

[4]Each was charged under the following sections of the UFW's Constitution (UFW Constitution), article XVIII:

> "Section 1: Any member of the Union may prefer charges against any other member of the Union for:

NEB appeal, if any — notice of each worker's "bad standing" was given to his or her employer, and the workers were thereupon terminated from employment pursuant to the union security provisions in the new collective bargaining agreements.

Only Scarbrough proceeded to the next internal union appeal level, the public review board (PRB).[5] Finding that the Union had failed to demonstrate the membership of persons voting at Scarbrough's trial and had failed to provide a complete trial record, the PRB overturned both the trial and NEB decisions and restored Scarbrough to full union membership. Due to delay caused largely by the apparent loss of Scarbrough's first PRB appeal notice filed in May 1980, the PRB decision and Scarbrough's subsequent reinstatement did not occur until May 1981.

Meanwhile, Scarbrough and the other workers each challenged his or her discharge by filing unfair labor practice

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. . . . . .

"(b) violating any provision of this Constitution;

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. . . . . .

"(dd) working without Union authorization during the period of an approved strike for a Ranch which is being struck by the Union;

"(ee) crossing an authorized Union picket line; . . ."

We additionally note that article XVII of the UFW Constitution, delineating obligations of membership, provides in section 4 that "Every member shall respect Union picket lines, for there is nothing lower than a strikebreaker."

[5]An appeal from a trial resulting in any disciplinary action lies to the NEB if taken within 15 days of the date of trial (or longer if the NEB determines that the interests of justice are served by an extension of up to 30 days). An NEB appeal stays enforcement of penalties pending its resolution. (UFW Const., art. XX, §§ 1(a), 1(b), 1(d).) In cases involving suspension or expulsion where the NEB upholds the trial action, further review is available by appeal to either the PRB or the first Convention following the NEB decision. Unlike the NEB appeal, however, this further review does not stay the suspension or expulsion. (UFW Const., art. XX, § 2.)

charges against the Union (§ 1154, subds. (a)(1) and (b)). Pasillas and Martinez filed charges against their employers as well (§ 1153, subds. (a) and (c)). The Board ordered the charges of Pasillas, Scarbrough and Martinez consolidated, and Navarro's case proceeded separately.

Hearings on the consolidated cases were held in April of 1981 before an administrative law judge (ALJ), and the ALJ's written decision was filed on the following October 9th. The ALJ concluded that, although the Union had power to suspend and hence cause the discharge of its members for strikebreaking, each charging party had been denied due process in the course of the disciplinary proceedings. The discharges were therefore held improper and all unfair labor practice charges were sustained. The ALJ ordered make-whole remedies, retroactive union membership in good standing and immediate offers of reinstatement for all charging parties.

On May 4, 1982, at a prehearing conference before an ALJ in Navarro's case, both sides waived an ALJ hearing and submitted the matter directly to the Board on stipulated facts and certain other documentary evidence, pursuant to Board regulation. (Cal. Admin. Code, tit. 8, § 20260.)

Board review of the ALJ decision in the consolidated cases of Pasillas, Scarbrough and Martinez culminated in a decision and order dated December 30, 1982. A majority of the Board upheld the ALJ's disposition as to Martinez, concluding that he was denied a fair hearing.[6] As to Scarbrough, the Board agreed with the ALJ that a September 1979 layoff caused by the Union constituted a violation of

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[6]Board member Jerome Waldie, finding no procedural due process violations as to Martinez, would have dismissed those allegations.

the Act. However, the Board dismissed allegations concerning his subsequent January 1980 discharge from employment in light of remedial actions already taken by the Union and declined to maintain jurisdiction over the matter. Portions of the consolidated complaint relating to Pasillas were dismissed by the Board for his failure to adequately exhaust internal union procedures.[7]

By a supplemental decision and order of April 15, 1983 (9 A.L.R.B. No. 17), the Board modified its prior decision as to Scarbrough after granting his motion for reconsideration. The Board reversed its position on the January 1980 discharge and accordingly issued a remedial order. Noting that Scarbrough had recently died, the Board ordered his estate entitled to backpay.

The Board issued its decision in Navarro's case (8 A.L.R.B. No. 104) on December 30, 1982, the same day as its decision in the consolidated cases. Concluding that the strikebreaking charges against Navarro were preferred well beyond the 60-day time period specified in the UFW Constitution (art. XVIII, § 4) and that extensions of time authorized by UFW President Cesar Chavez were ineffectual, the Board found a violation of Navarro's right to due process in the disciplinary proceedings and, due to the gravity of the violation, excused her failure to exhaust internal union procedures. The Board ordered retroactive restoration of union membership and reinstatement to employment, plus make-whole remedies.

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[7]Board member John McCarthy dissented and evidently would have found violations of the Act as to all charging parties. He felt that, where the charge against a union member was strikebreaking, any discipline resulting in suspension or expulsion, and consequent loss of employment under a union security provision, was invalid where less restrictive disciplinary action would be effective in promoting union solidarity.

On January 28 and 31, 1983, timely petitions were filed for review of the Board's two December 30, 1982 decisions. Pasillas and Navarro each petitioned in their respective cases, and the Union cross-petitioned in both cases (8 A.L.R.B. No. 103, 8 A.L.R.B. No. 104). Neither Martinez nor representatives of Scarbrough sought review. On May 16, the Union petitioned for review of the Board's supplemental decision of April 15, 1983 (9 A.L.R.B. No. 17). (§ 1160.8) We denied respondent Board's motion to dismiss Navarro's petition (see fn. 12, *post*). The five petitions were consolidated for review; we issued writs of review on January 18 and 26, 1984.

REVIEW

I

Preliminary to addressing several of the various issues presented herein, it is important to examine the language and history of the Act as it relates to the use of union security provisions.

The ALRA was enacted in 1975 to fill a long-standing void left by the National Labor Relations Act (NLRA) (29 U.S.C. § 151 et seq.),[8] which expressly excludes agricultural laborers from its definition of "employees." (NLRA, § 2(3) [29 U.S.C. § 152(3)].) Our state Supreme Court has noted: "[T]he entire ALRA is designed to provide agricultural workers with protection of their collective bargaining rights comparable to that provided nonagricultural workers by the NLRA. To that end the ALRA was patterned after the NLRA, with changes necessary to meet

[8]Originally enacted in 1935 and commonly known as the Wagner Act, the NLRA, as amended in 1947 (Taft-Hartley Act), is now incorporated as part of the Labor-Management Relations Act (LMRA) (29 U.S.C. § 141 et seq.) but continues to be cited as the NLRA. (29 U.S.C. § 167.) This opinion will at times refer to the original section numbering of the NLRA but with parallel citation to the United States Code.

special needs of California agriculture. [Citation.] ... [¶] The Legislature thus intended to adapt to California needs the proved federal instrumentality for protecting rights of employees and employers with respect to collective bargaining. [Citation.]" (*Tex-Cal Land Management, Inc. v. Agricultural Labor Relations Bd.* (1979) 24 Cal.3d 335, 345 [156 Cal.Rptr. 1, 595 P.2d 579]; see generally, Levy, *The Agricultural Labor Relations Act of 1975 — La Esparanza de California Para El Futuro* (1975) 15 Santa Clara L. Rev. 783 [hereinafter cited as Levy].) That intent is clear from the Act itself, section 1148 of which directs that "[t]he board shall follow applicable precedents of the [NLRA], as amended." State courts similarly will "look to established administrative and judicial interpretations of the federal act as permissive indicants of the appropriate interpretation of the state legislation. [Citations.]" (*Highland Ranch v. Agricultural Labor Relations Bd.* (1981) 29 Cal.3d 848, 855-856 [176 Cal.Rptr. 753, 633 P.2d 949].)

Both the state and federal acts permit union security agreements which require membership in a labor organization as a condition of continued employment.

The ALRA borrows word for word from the NLRA in, first, declaring expansive rights of employees to freely organize and participate in concerted activity directed at collective bargaining and, then, declaring a converse right to disassociate from such activities — but subject to the effect of union security agreements authorized by the Act.

Section 1152 provides: "Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities *except to the extent*

that such right may be affected by an agreement requiring membership in a labor organization as a condition of continued employment as authorized in subdivision (c) of Section 1153." (Italics added.) Thus the section announces two complimentary rights, one to associate and one to disassociate with concerted activities aimed at collective bargaining. It is apparent from the italicized language — its use of the word "right" in the singular and its position immediately following the announced right to *refrain* from concerted activities — that an authorized agreement conditioning continued employment on union membership is expected to adversely affect the *dis*associational right.

Again following the federal model, the ALRA states in section 1153: "It shall be an unfair labor practice for an agricultural employer to do any of the following: [¶] (a) To interfere with, restrain, or coerce agricultural employees in the exercise of the rights guaranteed in Section 1152.... [¶] (c) By discrimination in regard to the hiring or tenure of employment, or any term or condition of employment, to encourage or discourage membership in any labor organization." Subdivision (c) of section 1153 continues, in part: "Nothing in this part,[9] or in any other statute of this state, shall preclude an agricultural employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this section as an unfair labor practice) to require as a condition of employment, membership therein on or after the fifth day following the beginning of such employment, or the effective date of such agreement whichever is later, . . ."

Therefore, in defining what actions of an agricultural employer will constitute unfair labor practices, section 1153 carves out an exception for certain actions taken pursuant to an authorized union security agreement. Section

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[9]The Act comprises part 3.5 of division 2 of the Labor Code.

1154, defining what actions of a *labor organization* constitute unfair labor practices, similarly leaves room for the effects of such an agreement.[10]

With minor drafting differences, the federal act operates in much the same way. It declares the identical associational rights plus the disassociational right made subject to authorized union security agreements. (29 U.S.C. § 157 [formerly NLRA § 7].) It also defines unfair labor practices for both employers and labor organizations so as to accommodate the effects of such agreements. (29 U.S.C. § 158(a)(1), (a)(3) [formerly NLRA § 8(1), (3)], (b)(1) and (b)(2).)

Central to the controversy here is our state Act's divergence from the federal model in setting forth what conduct

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[10]Section 1154 states, in relevant part: "It shall be an unfair labor practice for a labor organization or its agents to do any of the following:

"(a) To restrain or coerce:

"(1) Agricultural employees in the exercise of the rights guaranteed in Section 1152. This paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein.

"

"(b) To cause or attempt to cause an agricultural employer to discriminate against an employee in violation of subdivision (c) of Section 1153, or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated for reasons other than failure to satisfy the membership requirements specified in subdivision (c) of Section 1153."

Petitioners Pasillas and Navarro both brought unfair labor charges against the Union (§ 1154, subds. (a)(1) and (b)), while only Pasillas brought charges against his employer (§ 1153, subds. (a) and (c)).

of an employee may result in his or her forced discharge from employment under a valid union security agreement.

Ever since the Taft-Hartley Act amendments in 1947, forced discharge under the NLRA has been explicitly restricted to instances wherein an employee's union membership is denied or terminated for nonpayment of periodic dues or initiation fees. The beginning language of section 158(a)(3) (29 U.S.C.) reads essentially the same today as its predecessor section in the Wagner Act of 1935. The section presently provides, in part, that it shall be an unfair labor practice for an employer, "by discrimination in regard to hire or tenure of employment or any term or condition of employment[,] to encourage or discourage membership in any labor organization: *Provided,* That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein. . . ." (Cf. 29 U.S.C. § 158(a)(3), with Act of July 5, 1935, ch. 372, § 8(3), 49 Stat. 452.) Thus, as originally enacted, the NLRA placed no express limits on use of the union security agreement.

The Wagner Act's provisions were reenacted in 1947 as part of the Taft-Hartley Act (see fn. 8, *ante*), and the union security section was thereby amended in an effort by Congress to cure serious abuses of union security arrangements — particularly the closed shop. (*Labor Board v. General Motors* (1963) 373 U.S. 734, 738-741 [10 L.Ed.2d 670, 673-675, 83 S.Ct. 1453].) The amendments abolished the closed shop by extending the section's original proviso so that an employee could satisfy the union membership condition imposed by a union security agreement by becoming a member of the union "on or after the thirtieth day following the beginning of such employment or the

effective date of such agreement, whichever is the later, . . ." (29 U.S.C. § 158(a)(3).) More important to our discussion, however, was the addition of a further proviso, "That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that *membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required* as a condition of acquiring or retaining membership."[11] (*Ibid.;* italics added.)

The practical effect of the Taft-Hartley amendments was to make "significant alterations in the meaning of 'membership' for the purposes of union-security contracts. . . . It is permissible to condition employment upon membership, but membership, insofar as it has significance to employment rights, may in turn be conditioned only upon payment of fees and dues. 'Membership' as a condition of employment is whittled down to its financial core. . . ." (*Labor Board* v. *General Motors, supra,* 373 U.S. 734, 742 [10 L.Ed.2d 670, 676].) Thus the amendments "were designed to allow employees to freely exercise their right to join unions, be good, bad, or indifferent members, or abstain from joining any

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[11]Reflecting that newly imposed restriction, the Taft-Hartley Act also made it an unfair labor practice for a union "to cause or attempt to cause an employer to discriminate against an employee in violation of [§ 158(a)(3)] or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated in some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership; . . ." (29 U.S.C. § 158 (b)(2).)

union without imperiling their livelihood. . . . Congress intended to prevent utilization of union security agreements for any purpose other than to compel payment of union dues and fees. . . ." (*Radio Officers* v. *Labor Board* (1954) 347 U.S. 17, 40-41 [98 L.Ed. 455, 477, 74 S.Ct. 323]; *Labor Board* v. *General Motors, supra*, 373 U.S. at pp. 740-741 [10 L.Ed.2d at p. 675].)

In contrast, our Legislature departed from the federal act's example, preferring the following limitation on "membership" for purposes of union security agreements: "For purposes of this chapter, membership shall mean the satisfaction of all reasonable terms and conditions uniformly applicable to other members in good standing; provided, that such membership shall not be denied or terminated except in compliance with a constitution or by-laws which afford full and fair rights to speech, assembly, and equal voting and membership privileges for all members, and which contain adequate procedures to assure due process to members and applicants for membership." (§ 1153, subd. (c).)

II

We decide first the question of whether the union security provisions utilized in these cases were properly given what the parties term "retroactive" effect. Each of the disciplined workers herein was expelled or suspended for alleged strikebreaking activities occurring during a hiatus between valid collective bargaining agreements, when no union security provisions were in force. The Union then compelled each of their discharges for "bad standing" after newly negotiated collective bargaining agreements containing union security provisions went into effect. Pasillas argued before the Board that this "retroactive" application of a union security provision is improper, but the Board did not address the issue in its decision and thus impliedly decided the issue against him.

Pasillas, joined in argument by Navarro,[12] contends that retroactive application violates the Act, conflicts with controlling federal precedent and, as an "ex post facto" deprivation of statutory rights, impermissibly abridges a worker's fundamental right to pursue a livelihood and violates substantive due process rights. The Board and the UFW strenuously argue that the wording and legislative history of the Act dictate a departure from federal Act precedent and mandate retroactive enforcement of all union security provisions.

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[12]Although Navarro did not herself raise this argument before the Board, we can conceive of no unfairness to either the Board or the UFW in allowing her to now raise the point. It is undisputed that both petitioners' strikebreaking activities occurred when no union security agreement was in force. The issue thus presents a pure question of law – one which the Board and UFW have fully addressed.

We explain here our reasons for denying a motion to dismiss brought by the Board. The Board moved to dismiss the petition of Navarro, arguing that, because the Board afforded her relief by way of retroactive reinstatement to membership and employment plus make-whole remedies for all economic losses, she was not a "person aggrieved" by the Board's order within the meaning of section 1160.8 of the Act and hence lacked standing to petition for review. We denied the motion.

Section 1160.8 begins: "Any person aggrieved by the final order of the board *granting or denying in whole or in part the relief sought* may obtain a review of such order in the court of appeal ...." (Italics added.) We find that Navarro was aggrieved by the Board having denied, in part, the relief she sought.

In her brief to the Board, Navarro contended that (1) she was denied due process by the Union's failure to abide by its 60-day filing rule, (2) she should be excused from having to exhaust internal union procedures, and (3) she was denied state and federal constitutional rights by having to maintain "formal membership" in the Union and to honor its strikes. (I CAR #2, pp. i-ii) While the Board found in her favor on the exhaustion and due process arguments and was thus able to fully restore her former status and

We conclude that the provisions here at issue were correctly applied although, as will appear, we are not entirely in accord with the position of the Board and Union.

The language of the Act is neutral. It neither requires nor forbids retroactive application. Section 1152 grants the right to refrain from organizational activities "except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of continued employment as authorized in subdivision (c) of Section 1153." While a section 1153-authorized agreement is clearly the only permitted intrusion on an employee's right to refrain (cf. *Radio Officers* v. *Labor Board,*

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remedy her losses without reaching her third contention, she was denied a further remedy which the Board could not furnish by the adjudicative path it traveled. Beyond the relief that she ultimately obtained, Navarro sought to secure a judicially enforceable cease-and-desist order tailored to prevent a repeat of the forced discharge she experienced. Moreover, denial of such additional relief – which is easily enforced (§ 1160.8) – would necessitate the burden of further proceedings to later adjudicate her claim.

Although we find no state court decision interpreting the "person aggrieved" language of section 1160.8, the identical language in the federal counterpart, NLRA section 10(f) (29 U.S.C. § 160(f)), has been construed in accord with our conclusion. In *Truck Drivers and Helpers Local No. 728 v. N. L. R. B.* (D.C. Cir. 1967) 386 F.2d 643, the union had sought injunctive relief to prohibit discrimination in regard to hire or tenure in violation of NLRA section 8(a)(3) (29 U.S.C. § 158(a)(3)), but the NLRB did not consider the issue, on the ground that it was affording relief under NLRA section 8 (a)(1). In passing on an intervener's motion to dismiss the union's petition, the circuit court stated: "We do not consider whether on the merits this disposition [of the request for injunctive relief] was within the Board's discretion. Plainly the motion to dismiss ... must be denied since the *failure of the Board to grant the additional relief sought* renders the Union a 'person aggrieved' within the meaning of [NLRA] § 10(f) ...." (Italics added; 386 F.2d at p. 644.)

supra, 347 U.S. 17, 41-42 [98 L.Ed. 455, 478]; but see *N. L. R. B.* v. *International Union, United A., A. & A. I. Wkrs.* (1st Cir. 1963) 320 F.2d 12, 15-16 [a union's constitution and bylaws may to some extent circumscribe the right, irrespective of the existence of a union security agreement]), the language of section 1152 just quoted does not limit the scope of such an agreement except in its cross-reference to section 1153.

Nor is the answer to retroactivity found in the guiding words of subdivision (c) of section 1153, defining an authorized agreement as one which may "require as a condition of employment [union membership], on or after the fifth day following the beginning of such employment, or the effective date of such agreement whichever is later, . . ." That language clarifies that continued employment may be conditioned upon union membership no earlier than five days after the agreement takes effect, but it does not indicate whether the required membership may be denied a then-current member for conduct predating the agreement.[13] Subdivision (c)'s limiting definition of "membership" as "the satisfaction of all reasonable terms and conditions uniformly applicable to other members in good

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[13]Of course, a union's constitution and bylaws will contain time limitations governing the bringing of charges against a member. (See, e.g., UFW Const., art. XVIII, § 4.) The constitution and bylaws of a union, constituting a binding contract with the members as to the union's authority to discipline and expel or suspend a member (*De Mille* v. *American Fed. of Radio Artists* (1947) 31 Cal.2d 139, 146 [187 P.2d 769, 175 A.L.R. 382], cert. den. (1948) 333 U.S. 876 [92 L.Ed, 1152, 68 S.Ct. 906]; *Posner* v. *Utility Union Workers of America* (1975) 47 Cal.App.3d 970, 974 [121 Cal.Rptr. 423]), will in that way impose a contractual limitation – independent of the Act – in the case of a member who has acted to jeopardize, but who has not yet lost, his or her good standing by the signing date of a security agreement.

standing . . ." is equally unhelpful for it does not indicate whether the terms and conditions of which it speaks must be satisfied only after the agreement comes into existence.

We therefore conclude that the *terms* of the Act do not require or forbid retroactive application. Before asking whether any *policy* of the Act was offended in these cases by retroactive application, however, we first must examine the language of the union security provisions here in question to determine whether they are susceptible of the retroactive construction impliedly given them by the Board. (Cf. *Colonie Fibre Co.* v. *National Labor Relations Board* (2d Cir. 1947) 163 F.2d 65, 67 & fn. 1, 69-70.)

The identical operative language is found in all three union security provisions utilized in these cases: "Any worker . . . who has been determined to be in bad standing by the Union pursuant to the provisions of the Union's constitution, shall be immediately discharged or suspended upon written notice from the Union to the Company, . . ." Key here are the words "*has been* determined to be in bad standing" (italics added), for they connote past discipline and, necessarily, past conduct. This use of the past tense is in contrast with the wording of the two preceding conditions: "Any worker who *fails* to become a member . . ., or who *fails* to pay the required initiation fee, periodic dues or regularly authorized assessments. . . ." (See fn. 3, *ante*, for full text.) In view of this parallel construction, it is reasonable to assume that, if the "bad standing" clause had been meant to operate only prospectively, it would have read, "Any worker . . . who *is* determined to be in bad standing . . ." shall be discharged or suspended upon request, and even that wording would leave open the possibility that the *conduct* for which a member is disciplined, as opposed to the imposition of discipline itself, could predate the signing date of the agreement. Therefore, the

intention of the parties to the agreement to allow retroactive application appears clearly from the language of the instrument itself and its clauses taken as a whole. (Civ. Code, §§ 1636-1639, 1641.) No resort to further constructional aids is appropriate. (Civ. Code, §§ 1639, 1649.)

In conclusion, although we are not bound under these circumstances by the Board's implied interpretation (cf. *Parsons* v. *Bristol Development Co.* (1965) 62 Cal.2d 861, 865-866 [44 Cal.Rptr. 767, 402 P.2d 839]), we agree as a matter of law with the retroactive interpretation placed on the union security provisions.

The remaining question is this: Did retroactive application in this case, something which the literal terms of both the Act and the provisions allowed, nevertheless offend against a legislative policy inherent in the Act? We conclude that it did not.

Pasillas and Navarro rely on long-settled federal precedent holding that retroactive application of a union security agreement to, in effect, require an employee to pay periodic dues or initiation fees for periods predating the signing of that agreement (and when no other such agreement was in effect) violates the terms and policy of the NLRA. The federal circuit courts have consistently found that discharges or threats of discharges under such circumstances constitute unfair labor practices whether brought about by union or employer. (See, e.g., *N. L. R. B.* v. *International Union, United A., A., A. Imp. Wkrs.* (1st Cir. 1961) 297 F.2d 272, 274-275 [union]; *N. L. R. B.* v. *Spector Freight System, Inc.* (8th Cir. 1960) 273 F.2d 272, 276-278 [union and employer], cert. den., 362 U.S. 962 [4 L.Ed.2d 877, 80 S.Ct. 879]; *National Labor Relations Bd.* v. *International Ass'n* (9th Cir. 1953) 203 F.2d 173, 174-175, 177 [union]; *National Labor Relations Bd.* v. *International Union* (7th Cir. 1952) 194 F.2d 698, 701-702 [union]; *Colonie Fibre Co.*

v. *National Labor Relations Board, supra,* 163 F.2d 65, 67-70 [employer]; see also *Industrial Union of Marine & Shipbuilding Wkrs.* v. *N. L. R. B.* (3d Cir. 1963) 320 F.2d 615, 619 [no employer violation in discontinuing enforcement of union shop and dues checkoff where agreement had expired], cert. den. (1964) 375 U.S. 984 [11 L.Ed.2d 472, 84 S.Ct. 516], *sub nom. Bethlehem Steel Co.* v. *National Labor Relations Board.*) They urge that those cases are "applicable [NLRA] precedents" within the meaning of section 1148 of our Act and hence must be followed. However, we find that the federal precedents conflict with the evident legislative intent behind our state Act and that, on the facts before us, no labor policy of our state was violated by retroactive application.

The rationale supporting the federal rule against retroactivity finds perhaps its clearest expression in an early case, *Colonie Fibre Co. v. National Labor Relations Board, supra,* 163 F.2d 65.[14] Two employees in *Colonie Fibre* were discharged at the request of the American Federation of Labor (AFL) shortly after the signing of a new contract with their employer containing a union security maintenance-of-membership agreement. They had both been AFL members during a prior AFL contract also containing a maintenance-of-membership agreement, but had ceased paying AFL dues toward the end of that contract's term and had joined and begun organizing for the rival Congress of Industrial Organizations (CIO), openly identifying themselves as CIO supporters and soliciting CIO membership

[14]Although *Colonie Fibre*, a 1947 decision, dealt with pre-Taft-Hartley Act events and law, post-Taft-Hartley decisions have found no basis in congressional intent for applying a different rule. (See, e.g., *National Labor Relations Bd.* v. *International Union, supra,* 194 F.2d 698, 701-702, following *Colonie Fibre* and concluding that neither section 8(3) of the original federal act nor section 8(a)(3) of the amended act sanctioned retroactive application of a union security agreement.)

from among their coemployees at work. The old contract then expired without a new one being signed, negotiations having been forestalled by a pending CIO-backed petition for investigation and certification of representatives filed as the result of the two employees' efforts. After the ensuing election resulted in recertification of the AFL, the new contract was entered into amidst AFL and employer complaints about the two CIO members. The AFL then demanded and obtained the company's discharge of the two employees under the newly effected security agreement because of their CIO activities and their failure to pay past AFL dues over the interim period when no contract was in force. (163 F.2d at pp. 65-67.)

On those facts, the Second Circuit in *Colonie Fibre* agreed with the conclusion of the NLRB that the retroactive maintenance-of-membership feature of the union security agreement rendered it invalid as being beyond the authorization of section 8(3) (now part of § 8(a)(3)) of the federal act (see fn. 14, *ante*). (163 F.2d at pp. 67, 70.) The court quoted at length from, and apparently adopted, the NLRB's reasoning that retroactive application in that case was inconsistent with both the terms of the act and its policy of promoting free self-organization. (*Id.*, at p. 67.) The Board had relied on language in *Labor Board v. Electric Cleaner Co.* (1942) 315 U.S. 685 [86 L.Ed. 1120, 62 S.Ct. 846], in "literally" construing section 8(3)'s proviso (now the first proviso of the amended section) as permitting only " 'contracts which require membership *during their term* . . .' " and hence as not sanctioning " 'contracts which require *past* membership . . .' " (*Colonie Fibre, supra*, 163 F.2d at p. 67.)[15] Thus, it reasoned, to require past dues was to

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[15]The Supreme Court in *Labor Board* v. *Electric Cleaner Co., supra*, was actually interpreting NLRA section 8(3)'s specific proviso language allowing an employer to make "an agreement with a labor organization (*not established, or assisted by any action defined*

require past membership in violation of the NLRA's terms. (Pp. 67-68.) Next, the Board found as a matter of NLRA policy that " '[a]pproval of a contract which made it possible for the contracting union to require payment of past dues as a condition of future employment would have a seriously detrimental effect upon freedom of organization,' " a goal of the federal act. (P. 68.) " '[I]n actual practice,' " the board observed, " 'the employee's right to support and select the bargaining representative he wanted would largely be reduced to the right to guess which of two or more competing unions would ultimately be chosen by the majority. Thus, approval of the contract before us would substantially impair freedom of choice at a time when the statute requires such freedom [i.e., during an election campaign between contracts]. To permit this impairment would make it difficult for advocates of a change in representation to present their case to their fellow employees.' " (*Ibid.*)

In contrast with the result and reasoning in *Colonie Fibre,* we feel compelled by our state Act's distinctive legislative history and treatment of union security to reject the federal rule insofar as it flatly forbids, as a matter of statutory construction, all retroactive application of union security devices. The federal precedent relied on by Pasillas and Navarro is to that extent inapplicable and not to be followed. (§ 1148.) We further conclude, on the facts before us, that retroactive application did not substantially impair protected associational activities of Pasillas or Navarro.

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in this Act as an unfair labor practice)" (italics added) when it observed, in language relied on by the board in *Colonie Fibre:* "These words of exception must have been carefully chosen to express the precise nature and limits of permissible employer activity in union organization. . . ." (315 U.S. 685, 695 [86 L.Ed. 1120, 1127, 62 S.Ct. 846].)

Addressing first the right of Pasillas and Navarro to refrain from associational activities (§ 1152), there is simply no record evidence that either worker's strikebreaking was motivated by a desire to organize on behalf of a rival labor organization or even to protest the UFW's position as their certified union, and neither worker attempted to resign his or her membership at any time before or during the strikes. Their discharges therefore cannot be in any way attributed to an improper retaliatory purpose by their union or employers that might offend principles of free self-organization, a concern which permeates many of the federal cases. (See, e.g., *N. L. R. B.* v. *International Union, United A., A., A. Imp. Wkrs., supra*, 297 F.2d 272, 273 [employees discharged following a close election had formed an antiunion committee and resigned from the union during a hiatus between contracts]; *National Labor Relations Bd.* v. *International Ass'n, supra*, 203 F.2d 173, 174-175 [discharged employees had campaigned before and after expiration of a prior contract to oust the union as the employees' representative and were later expelled from membership on charges of "dual unionism"]; *Colonie Fibre Co.* v. *National Labor Relations Board, supra*, 163 F.2d 65, 66-67 [also involving "dual unionism" charges following organizational activity].) The financial hardships of prolonged concerted efforts such as the 1979 strikes shown here are, of course, potentially devastating to all members. However, we are confident that section 1152 was not designed to allow a member to freely disassociate from a collective strike effort based on financial hardship alone. Such a result would give every member an unassailable "right to refrain" and effectively undermine a union's power at a critical time in its representative capacity. Neither Pasillas nor Navarro opposed their strikes in principle. The interests which they assert are purely financial.

Absent demonstrated and substantial infringement of associational rights which the Act is designed to protect, we must respect "the power in the chosen union to protect against erosion its status . . . through reasonable discipline of members who violate rules and regulations governing membership. That power is particularly vital when the members engage in strikes. The economic strike against the employer is the ultimate weapon in labor's arsenal for achieving agreement upon its terms, and '[t]he power to fine or expel strikebreakers is essential if the union is to be an effective bargaining agent. . . .'" (*NLRB* v. *Allis-Chalmers Mfg. Co.* (1967) 388 U.S. 175, 181, fns. omitted [18 L.Ed.2d 1123, 1128, 8 S.Ct. 2001]; cf. *Machinists Local 1327* v. *N.L.R.B.* (9th Cir. 1984) 725 F.2d 1212, 1218.) Under the ALRA, a union's vital power to expel a strikebreaker carries with it the power to later force the strikebreaker's discharge under an authorized union security provision. This is an easily foreseeable consequence under the statutory scheme which was plainly anticipated by the Legislature since our Act envisions possible discharge for strikebreaking, or for a host of other union rule violations, so long as that action is not arbitrarily or selectively taken and fairness attends the disciplinary process. (§ 1153, subd. (c).)

Furthermore, although we have already noted that the Act's wording itself is neutral on the issue of retroactivity, committee debate in the California Legislature and the Act's expansive authorization of the union security agreement device leads us to conclude that the framers of the Act specifically contemplated and accepted retroactive application as a permissible component of California agricultural labor policy.

In hearings before the Assembly Labor Relations Committee, Teamster Attorney Cross voiced concern that the

wide latitude given a union through union security agreements might be misused by a victorious union, in the aftermath of a contest between rival unions, to exact reprisals against workers who had supported the losing union. "If . . . the [victorious] union were successful in getting the union security clause," he hypothesized, "the union could then turn around and exclude the people who worked or didn't support the boycott, who crossed the picket line and turn to the employer and say '[F]ire this man because he is no longer a member in good standing'. It's a novel proposition of the law and we feel that there should be language in the law which provides that no conduct which receives ["precedes" probably intended] the certification date should be a basis for expulsion from membership. . . ." (Hearing before Assem. Lab. Relations Com. on Assem. Bill No. 1533 (Reg. Sess., May 12, 1975) [hereinafter Assembly Committee Hearing] p. 41.) Although Mr. Cross' concerns centered on the kind of retaliatory, postcampaign tactics which we find lacking in the present cases, his example *assumed without dispute* retroactive application. No comment came in response to his assumption, and the proposed amendment found no support.

Aside from that legislative history, there is further circumstantial support for retroactivity in the operation of the statute. First, the NLRA's dues-and-fees limitation results naturally in a class of employees who have been expelled or suspended for nondischargeable grounds, and who are therefore not formal members in good standing yet are dues-paying "members" for purposes of retaining their jobs. The added distinctions in status arising from the operation of a nonretroactivity rule simply compound an existing NLRA phenomenon. The ALRA, on the other hand, equates bad standing with threat of discharge, subject of course to the safeguards of section 1153, subdivision (c), and there is therefore no phenomenon of dual membership status. To impose a rule of nonretroactivity onto the

state scheme would introduce for the first time in California agriculture an area of uncertainty. This uncertainty would be greatly compounded under the state Act due to an agricultural worker's tendency to change employment seasonally and oftentimes to work for more than one employer at a time. Overlapping employment periods and frequent gaps between them, coupled with staggered expiration of collective bargaining agreements containing varying union security arrangements, would play havoc with an otherwise stable scheme. From this we further conclude that a rule of nonretroactivity was not envisioned for the ALRA.

Second, a discharged employee under the federal act can presumably effect his own reinstatement by paying back dues and fees, new initiation fees, etc., and in that way cure his bad standing. (Cf. *DeMille* v. *American Fed. of Radio Artists, supra*, 31 Cal.2d 139, 155.) However, an employee may lose good standing and be discharged under the ALRA on nonmonetary grounds which he or she is helpless to cure, and thus may have to ride out a specific term of suspension or an uncertain period of bad standing following outright expulsion. We do not think that our Act, which sanctions noncurable, set periods of bad standing and hence loss of employment, was intended to allow a discharged worker to avoid those results by shopping for an employer whose current union contract was, for example, fortuitously signed one week following the conduct which brought about the discipline.

In summary, we conclude that retroactive application of union security agreements in general is allowed though not required by the Act.[16] Because the particular union security

[16]Because the Act itself does not, as the Union maintains, affirmatively require retroactive application, but rather leaves the matter preliminarily to the parties' contractual negotiations, we find no support for the constitutionally based claims of Pasillas and Navarro. (See discussion in part III, *post*.)

provisions examined here allowed for retroactive application and because no countervailing associational rights were substantially impaired thereby, the provisions were properly given retroactive effect.[17]

III

Pasillas and Navarro contend that section 1153, subdivision (c), of the Act, both by its enactment and in its application in the instant cases, impermissibly abridges their fundamental rights to free speech and association guaranteed them by the First and Fourteenth Amendments of the federal Constitution and by article I, sections 2 and 3, of the California Constitution. Section 1153, they argue, in authorizing union security agreements which require a worker to join and maintain membership in good standing in a union, is unconstitutional because it does not serve a compelling state interest by the least intrusive means available. Further, Pasillas maintains that the section's uniquely expansive authorization of the union security device in California agriculture, where workers are predominantly Mexican-American or of hispanic origin, violates the equal protection clause of the Fourteenth Amendment. The common starting point for these claims is the question of "state action." (*Lugar v. Edmondson Oil Co.* (1982) 457 U.S. 922, 936-937 [73 L.Ed.2d 482, 495, 102 S.Ct. 2744]; see *Rendell-Baker v. Kohn* (1982) 457 U.S. 830, 837 [73 L.Ed.2d 418, 425, 102 S.Ct. 2764].)[18]

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[17]We have analyzed this latter issue solely in terms of whether the Board properly gave effect to the provision because neither Pasillas nor Navarro based their unfair labor practice charges on retroactivity itself.

[18]For the sake of clarity and simplicity, we employ the term "state action" throughout this opinion to connote actions of either the state or federal governments.

We decline to address the issue raised by Pasillas that the ALRA's

Does the enactment or application of section 1153, subdivision (c), constitute state action? No reported decision has yet passed on the question. However, we are guided by federal decisions which have examined the issue of state action in the context of union security agreements authorized under the NLRA and the Railway Labor Act (RLA) (45 U.S.C. § 151 et seq.).

In *Railway Employees' Dept. v. Hanson* (1956) 351 U.S. 225 [100 L.Ed. 1112, 76 S.Ct. 714], the United States Supreme Court found state action in the operation of the RLA's provision authorizing union security agreements (45 U.S.C. § 152 Eleventh) and thereby reached state and federal constitutional questions in the case. The court observed that, while the RLA section did not compel but merely permitted union shop agreements, it specifically preempted state law, thereby, conflicting with a state law in that case that would have invalidated the agreement. "If private rights are being invaded," the court reasoned, "it is by force of an agreement made pursuant to federal law which expressly declares that state law is superseded. [Citation.] In other words, the federal statute is the source of the power and authority by which any private rights are lost or sacrificed. [Citations.] The *enactment of the federal statute authorizing union shop agreements is the governmental action* on which the Constitution operates, though it takes a private agreement to invoke the federal sanction." (351 U.S. at p. 232 [100 L.Ed. at p. 249]; fn. omitted and italics added.)

In two subsequent cases, both involving employee challenges to the use of union dues collected from them under the same RLA provision at issue in *Hanson*, the Supreme

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assertedly disparate impact on Mexican-American or hispanic workers also violates rights guaranteed under section 1981 of the United States Code, title 42. The issue is spuriously appended to his equal protection argument without any citation to authority.

Court grounded its decisions on a construction of the statute that forbids use of dues for political purposes which an employee opposes. (*Machinists v. Street* (1961) 367 U.S. 740, 768-769 [6 L.Ed.2d 1141, 1160-1161, 81 S.Ct. 1784]; *Railway Clerks v. Allen* (1963) 373 U.S. 113, 118 [10 L. Ed.2d 235, 239, 83 S.Ct. 1158].) Constitutional issues, and hence the question of state action, therefore did not arise.

Then, in *Abood v. Detroit Board of Education* (1977) 431 U.S. 209 [52 L.Ed.2d 261, 97 S.Ct. 1782], the Supreme Court was faced with challenges to the exaction and use of service charges (equivalent in amount to member dues) paid by nonmember employees pursuant to an agency shop arrangement authorized by a state statute allowing union representation of local government employees. (431 U.S. at pp. 212-215 [52 L.Ed.2d at pp. 269-271].) Relying on *Hanson* and *Street,* and drawing parallels between the operation and purposes of the state act and the RLA, the court upheld the validity of the agency shop arrangement itself and concluded that the union expenditures were valid for purposes related to the union's collective bargaining role but not for unrelated political purposes to which the employee objected. (*Id.*, at pp. 226-227, 233-237 [52 L.Ed. 2d at pp. 278, 283-285].)

On the issue of state action, the *Abood* court noted that the affected employees worked directly for the state and that "the actions of public employers surely constitute 'state action,' . . ." In a footnote, the majority added this clarification of its position, quoting from and responding to remarks made by Justice Powell in his concurring opinion: "Nothing in our opinion embraces the 'premise that public employers are under no greater constitutional constraints than their counterparts in the private sector,' . . . or indicates that private collective-bargaining agreements are, without more, subject to constitutional constraints. . . . We compare the

agency-shop agreement in this case to those executed under the Railway Labor Act simply because the existence of governmental action in both contexts requires analysis of the free expression question." (*Id.*, at p. 226, fn. 23 [52 L.Ed.2d at p. 279]; see conc. opn. of Powell, J., *id.*, at pp. 245, 252 [52 L.Ed.2d at pp. 290, 295].) By that footnote, the majority made it clear that state action in *Abood* was furnished by the actions of a public employer and not by reliance on any rationale of the RLA cases. The majority had emphasized in an earlier footnote that state action in the *Hanson* decision, *supra*, 351 U.S. 225, had depended on the RLA's preemption of contrary state law; it had further noted in passing that the NLRA, unlike the RLA, does not preempt state right-to-work laws but in fact expressly authorizes them. (P. 218, fn. 12 [52 L.Ed.2d at p. 273]; 29 U.S.C. § 164(b).)

Recently, the high court once more considered challenges to the use of dues compelled under an RLA-authorized union security agreement and, as in *Hanson*, had occasion to reach constitutional claims. In *Ellis v. Brotherhood of Railway, Airline and Steamship Clerks* (1984) ___ U.S. ___ [80 L.Ed.2d 428, 104 S.Ct. 1883], employees of a private airline argued that use of fees to finance various union expenditures was improper and that a union rebate program devised to protect the rights of protesting employees was deficient. The court agreed on the latter score (___ U.S. at p. ___ [80 L.Ed.2d at p. 439]) and then examined each of the fee-funded union activities at issue, applying the statutory construction standard previously utilized in the post-*Hanson* cases of *Street* and *Allen* (both discussed *supra*). Finding that funding of three of the six activities was indeed authorized by the RLA, the court subjected those expenditures to First Amendment scrutiny and upheld them. (*Id.*, at pp. ____ [80 L.Ed.2d at pp. 446-447].)

Ellis appears to pose conceptual difficulties as regards state action. The objecting employees there worked for a

private rather than a state entity, and although the dispute arose under an RLA-authorized agreement which would have preempted any contrary state law, the case originated in California which, we are authorized to notice (Evid. Code, § 451, subd. (a)), has not enacted right-to-work legislation. Despite this theoretical problem (see discussion in *Wicks v. Southern Pacific Co.* (9th Cir. 1956) 231 F.2d 130, 135-137, cert. den., 351 U.S. 946 [100 L.Ed. 1471, 76 S.Ct. 845]), the practical answer appears to be that the state action issue was simply never raised or preserved for review. The Supreme Court opinion does not address it, and the decision below by the Ninth Circuit Court of Appeals seems to assume in a footnote, without analysis, that the *Hanson* decision is controlling on the point. (*Ellis v. Broth. of Ry., Airline & S. S. Clerks* (9th Cir. 1982) 685 F.2d 1065, 1067, fn. 1.)

While the United States Supreme Court has not directly spoken on the state action question in the context of NLRA section 8(a)(3), the parallel provision to our Act's section 1153, subdivision (c), several federal circuit courts have specifically addressed the question and differed in their conclusions. In the most recent and by far most thorough analysis, the District of Columbia Circuit in *Kolinske* v. *Lubbers* (D.C. Cir. 1983) 712 F.2d 471, argued persuasively and concluded that an agency shop clause conditioning access to strike benefits on, among other things, participation in strike activities, did not constitute state action. Noting that "section 8(a)(3) of the NLRA at most merely authorizes the use of agency shop fees" and the "crucial distinction" that the NLRA, unlike the RLA, does not preempt state right-to-work laws, the court found no direct governmental involvement and thus distinguished the *Hanson* rationale. (712 F.2d at p. 476.) The *Kolinske* court next went on to distinguish the public employer rationale of *Abood*, since the actor in *Kolinske* was a private entity — a union. (Pp.

474, 476-477.) Finally, facing what it concluded was an open question requiring independent inquiry, the court exhaustively studied the various strands of state action doctrine, ultimately concluding that the indirect action of the government in authorizing union security provisions through the enactment of the NLRA did not sufficiently involve the government so as to trigger First Amendment scrutiny. (Pp. 477-480.)

In a much earlier case, the Tenth Circuit had reached the same result, even without the benefit of the Supreme Court's later decision in *Abood*. In *Reid* v. *McDonnell Douglas Corporation* (10th Cir. 1971) 443 F.2d 408, no state action was found in the compulsory exaction of agency fees from nonmembers pursuant to an NLRA-based union security clause, and the constitutional claims of the plaintiff class, who objected to use of the fees for union political purposes, could not be reached. The RLA rationale was perceived as hinging on the preemption of state law and possibly on the comprehensive regulatory scheme evident in the RLA. As to the latter point, the court stated, "Whatever the wisdom of this reasoning for the [RLA], it has no applicability to the [NLRA]," concluding that "the policy with respect to union security agreements expressed in the NLRA is more neutral and permissive than the policy of the RLA." (443 F.2d at p. 410; see also *Peltzman* v. *Central Gulf Lines, Inc.*, (2d Cir. 1974) 497 F.2d 332, 334 [summarily rejecting constitutional attacks on a union security clause under the NLRA], cert. den. (1976) 423 U.S. 1074 [47 L.Ed.2d 83, 96 S.Ct. 857].)

Standing against the *Kolinske* and *Reid* cases is the First Circuit decision in *Linscott* v. *Millers Falls Company* (1st Cir. 1971) 440 F.2d 14 (cert. den. 404 U.S. 872 [30 L.Ed.2d 116, 92 S.Ct. 77]), where a two-member majority of the court found state action in an NLRA-authorized union shop agreement entered into between a private employer and the

union. The court was therefore able to reach the plaintiff's First Amendment claim that coerced payment of dues violated her right to free exercise of religion, a claim which the court ultimately rejected on the merits. (440 F.2d at pp. 17-18.) Dismissing the argument that *Hanson*, an RLA case, should be distinguished because of the preemption feature of that act, the majority reasoned that, by necessary implication from the RLA's preemption provision, "federal approval, and hence federal enforcement, will exist in those states that do not enact such a law. [Citations.]" (P. 17.) The concurring member in *Linscott*, who would have affirmed solely on the basis that there was no state action, argued forcefully that the NLRA provision (29 U.S.C. § 164(b)) allowing state right-to-work laws "is not only incapable by its terms of overriding any inconsistent state legislation but, unlike the [RLA] provision, represents a weakening rather than a strengthening of federal policy toward union shop. . . . [I]t would follow logically from a ruling that [the NLRA provision] constitutes federal support and authority for union shop that [its preenactment] Congressional silence also constituted federal support and authority. From that logical point it is but a short step to the conclusion that all Congressional silence constitutes endorsement or, put another way, that all federal inaction is really federal action." (*Id.*, conc. opn. of Coffin, J., at pp. 19-20.)

Two other circuit court opinions of approximately the same vintage as *Linscott* implicitly assume without discussion that state action exists in the NLRA context. (*Hammond* v. *United Papermakers & Paperworkers Union* (6th Cir. 1972) 462 F.2d 174, 175 [citing *Linscott*], cert. den., 409 U.S. 1028 [34 L.Ed.2d 322, 93 S.Ct. 464]; *Seay* v. *McDonnell Douglas Corporation* (9th Cir. 1970) 427 F.2d 996, 1003 [citing *Hanson*].) However, the issue appears not to have been disputed in either case.

We are satisfied, upon this survey of federal precedent, that the reasoning of the *Kolinske* and *Reid* decisions is sound and should be applied in analyzing our own Act. The *Linscott* majority opinion stands alone, in its finding of state action, among all circuit courts to have expressly considered the question in the NLRA context. To the extent that the *Linscott* majority relied on *Hanson* for its finding of state action, we are confident that a different conclusion would have been reached had that court had the benefit of the 1977 Supreme Court decision in *Abood,* which removed any doubt that the state action in *Hanson* depended on the preemptive feature of the RLA, a feature not found in the NLRA.[19] To the extent that the *Linscott* majority relied on the NLRA's antipreemption provision as an indicant of state action,[20] we are persuaded by the

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[19]In a recent case, involving an employee's federal constitutional challenge to his denial of formal union membership for his refusal to swear an oath, the First Circuit reexamined its *Linscott* decision. In *Hovan* v. *United Broth. of Carpenters & Joiners* (1st Cir. 1983) 704 F.2d 641, the court found no state action, distinguishing *Linscott* as involving a discharge under a union security agreement whereas the employee in *Hovan* merely sought to be allowed to attend union meetings and could not, under the NLRA, have suffered discharge for refusing to take the oath. (*Hovan, supra,* 704 F.2d at pp. 643-644.) On the basis of that distinction, apparently one of degree rather than principle, the court found no need to "call *Linscott* into question to conclude that no governmental action [was] present" in *Hovan.* (*Id.,* at p. 643.) However, after reconsidering its *Linscott* rationale in retrospect and in light of the *Abood* clarification (that *Hanson* depended on preemption for state action), the court observed, "[I]n *Linscott,* this court went beyond Hanson . . . ." (*Ibid.*)

[20]The NLRA provision (29 U.S.C. § 164(b)) reads: "Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law."

concurring opinion's argument that such inaction could not constitute action.

Bringing the principles of the federal decisions to bear on our state Act, we initially conclude that nothing in its provisions compels the use of union security agreements. Our Act, like the NLRA, is neutral in this respect and leaves the parties free to accept or reject such agreements. The Act carefully leaves that component of free choice intact in defining associational rights of employees (§ 1152), unlawful restraint or coercion of an employee's exercise of those rights (§§ 1152, 1153, subd. (a), 1154, subd. (a)(1)) and unlawful discrimination on the basis of union membership (§§ 1153, subd. (c), 1154, subd. (b)).

But does our Act, like the RLA, preempt a preexisting bar to the inclusion or enforcement of such agreements by authorizing them? We conclude not. No preexisting statute established such a bar, and the common law labor policy of California embraced a wide variety of union security agreements, including those calling for the closed or union shop. (*Messner* v. *Journeymen Barbers etc. International Union* (1960) 53 Cal.2d 873, 877-879, 882-883 [4 Cal.Rptr. 179, 351 P.2d 347]; *Petri Cleaners, Inc.* v. *Automotive Employees, etc., Local No. 88* (1960) 53 Cal.2d 455, 470-471 [2 Cal.Rptr. 470, 349 P.2d 76].) Suspension or expulsion under such agreements was permissible, subject to rudimentary due process requirements of notice and hearing in the case of discipline for charges other than nonpayment of dues and fees. (*DeMille* v. *American Fed. of Radio Artists, supra,* 31 Cal.2d 139, 154-155.) It was observed in *Gabaldon* v. *United Farm Workers Organizing Committee* (1973) 35 Cal.App.3d 757 [111 Cal.Rptr. 203] (cert. den. (1974) 416 U.S. 957 [40 L.Ed.2d 307, 94 S.Ct. 1972]), just two years before enactment of the ALRA, that "California has no statute or policy

either requiring that collective bargaining agreements include union shop provisions or invalidating such agreements. . . ." (35 Cal.App.3d at p. 763.)

There being no element of compulsion in the Act favoring the use of union security agreements, the question becomes whether the Act's mere authorization and protection of them constitutes state action.

Helpful in this part of the analysis is *Gabaldon* v. *United Farm Workers Organizing Committee, supra,* 35 Cal.App. 3d 757, for that case considered the question of whether, in a pre-ALRA setting, the actions of a union and an employer in entering into a union security agreement under which a worker charged with "antiunion activity" could be discharged at union request, constituted state action by virtue of California's (pre-ALRA) policy to encourage and protect union shop agreements. (35 Cal.App.3d 757, 760-761, 764.) Farm worker class action plaintiffs in *Gabaldon* sought damages and declaratory and injunctive relief in a suit against the union and 26 growers, alleging deprivation of numerous constitutional rights. (*Id.,* at pp. 759-762.) The appellate court found no state action, however, and therefore affirmed a judgment on the pleadings in the defendants' favor. (P. 768; in accord is the companion case in federal court, *Mendoza* v. *United Farm Workers Organization Committee* (9th Cir. 1973) 487 F.2d 311, 312, cert. den. (1974) 415 U.S. 918 [39 L.Ed.2d 472, 94 S.Ct. 1416].)

Plaintiff-appellants in *Gabaldon* argued that there was state action in California decisions upholding the validity of union security agreements, in decisions holding local right-to-work ordinances invalid as preempted by state statutes, and in Labor Code provisions which outlawed yellow-dog contracts, provided for enforcement of collective bargaining agreements, declared associational and self-organizational rights for workers and made coercion of

employees regarding union membership illegal. The Court of Appeal responded: "In our view . . . the state policy so announced and the case decisions referred to do not change the fundamental fact that California has taken no action to require the inclusion of a union shop provision in a collective bargaining agreement or to invalidate such a provision. A collective bargaining agreement without a union shop covenant is entitled to legal protection. The position of the state can best be characterized as one of benign neutrality in that labor and management are free from any hindrances upon opportunities to bargain collectively. The Legislature has in effect left the field unregulated, neither requiring nor prohibiting union shop provisions but lending its support and encouragement to collective bargaining agreements freely entered into and making them equally enforceable in the courts whether such agreements do or do not contain union shop provisions. Such passivity falls far short of the state action required to bring the federal constitutional protections into operation." (35 Cal.App.3d 757, 764-765.)

On the issue of whether preemptive state statutes invalidating local right-to-work ordinances created a *Hanson*-type state involvement, the *Gabaldon* court distinguished *Hanson,* in part, by this reasoning: "[T]he union shop has always been lawful in California and thus the enactment of the [complained of] Labor Code sections did not divert from the traditional policy of the state. [Citation.] Furthermore, the local right to work ordinances did not originate until well after the enactment of the controlling sections of the Labor Code, while in *Hanson* the right to work laws were enacted prior to the union shop provision of the [RLA] which was designed to supersede them. . . ." (P. 767.)

Pasillas and Navarro do not argue against the reasoning in *Gabaldon;* rather, they argue that subsequent enactment

of the ALRA inaugurated a deeper involvement of the state into privately negotiated union security agreements which now sufficiently imbues those private actions with the imprimatur of the state to trigger constitutional scrutiny. We have to disagree.

California's previous position of "benign neutrality" regarding the freedom of labor and management to include or exclude union security agreements remains unchanged with the advent of the ALRA. Measuring the ALRA against the NLRA, Pasillas and Navarro would find an *increased* state involvement in our Act's rejection of the NLRA dues-and-fees limitation on discharges and its broad tolerance of discharges for suspensions and expulsions grounded on other disciplinary charges. (§ 1153, subd. (c).) However, in this regard the ALRA is no different from federal law under the original Wagner Act, which lacked the dues-and-fees limitation. The ALRA, by *not* imposing that limitation, thus constitutes *less* of a governmental intrusion than its present day federal counterpart. Also, it must be remembered that Pasillas and Navarro, who belong to a class of workers (agricultural employees) not covered by the NLRA and its dues-and-fees limitation, would enjoy no greater protection against use of union security agreements if the ALRA were repealed or invalidated. In fact they would *lose* protections granted them under the Act which were traditionally unknown in the area of internal union discipline. (See discussion in part IV, *post.*) But more importantly, the state and federal differences in the permitted scope of union security operation once agreements are reached does not alter either act's passive neutrality regarding the freedom to include or exclude those agreements in the first place.

The act similarly does not change prior law in its neutral enforcement of collective bargaining agreements. As

before, enforcement is available whether or not they contain union security provisions. (§ 1165.)

The pre-ALRA reasoning of *Gabaldon* is, in our view, still valid. It was noted there that the Legislature had "in effect left the field unregulated, *neither requiring nor prohibiting* union shop provisions but *lending its support and encouragement* to collective bargaining agreements *freely entered* into and making them *equally enforceable*" regardless of the inclusion of union security provisions. (35 Cal. App.3d 757, 765; italics added.) In enacting the ALRA, however, the Legislature has essentially codified the state's previous policy as to union security agreements. As already noted, such agreements are still neither required nor prohibited, and collective bargaining agreements continue to be equally enforced, with or without them. The characteristics of support and encouragement and freedom of choice also remain evident not only in the operation of the Act, but also in the statement of policy found in section 1140.2. The state's policy under the Act is to "encourage and protect" the right of agricultural employees to, among other things, full freedom in "designation of representatives" and freedom to "negotiate the terms and conditions of their employment, . . ." (§ 1140.2.)

We hold that neither the inclusion of union security agreements authorized by the Act nor their enforcement against Pasillas and Navarro constituted state action; constitutional protections therefore did not attach.

We reach the same result notwithstanding reliance by Pasillas and Navarro on the rationale of *Gay Law Students Assn. v. Pacific Tel. & Tel. Co.* (1979) 24 Cal.3d 458 [156 Cal.Rptr. 14, 595 P.2d 592], to support their argument that state action can be found under the California Constitution. Drawing in part upon an overview of federal labor cases including *Steele v. L. & N. R. Co.* (1944) 323 U.S. 192 [89

L.Ed. 173, 65 S.Ct. 226]. *Hanson* and *Abood,* the Supreme Court in *Gay Law Students* concluded that a public utility, by virtue of its state-protected monopoly status and quasi-government entity character, was prevented by our state's equal protection guarantee (Cal. Const., art. I, § 7, subd. (a)) from arbitrarily excluding homosexuals from employment opportunities. (*Gay Law Students, supra,* 24 Cal.3d at pp. 469-475.) Then, relying in part on a rule first articulated in this state in *James v. Marinship Corp.* (1944) 25 Cal.2d 721 [155 P.2d 329], that a labor union having attained a monopoly supply of labor owes similar but common-law-based obligations to refrain from arbitrary discrimination in choosing its members, the court found that the public utility's discriminatory employment practices also violated a statutory embodiment of those common law duties. (Pub. Util. Code, § 453, subd. (a); *Gay Law Students, supra,* at pp. 480-485.)[21]

The Board, which now takes the position that there is *no* state action, has itself relied on the *Gay Law Students* rationale to *find* state action in the operation of an Act-authorized union security agreement like the ones at issue here. (*J. Jesus R. Conchola* (1980) 6 A.L.R.B. No. 16, pp. 10-15.) It was made clear at oral argument, however, that the Board considers its decision in *Conchola* to have been "advisory" only.

We do not believe that *Gay Law Students* can be read for the broad proposition being urged here — that state action is present whenever a union enjoying "monopoly"

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[21]Justice Tobriner, writing for the court in *Gay Law Students,* reasoned: "In *Marinship* [a case challenging discrimination against blacks in union membership] our court emphatically rejected the suggestion that a union with a closed shop agreement could be equated with an ordinary private voluntary association. Chief

status acts pursuant to a state-authorized union security agreement; the decision must be read in context, as addressing only the problem of *arbitrary discrimination* in employment (or membership) criteria affecting an individual's fundamental right to work. The "state action" found in that case was enough to trigger our state Constitution's equal protection guarantee, but the Supreme Court gave no indication in that case that the same threshold degree of governmental involvement would have sufficed as well for our state's free speech and associational guarantees.

The principal federal case relied upon in *Gay Law Students* similarly concerned arbitrary (i.e., racial) discrimination and was resolved by construing the RLA as demanding rights *coextensive* with federal equal protection, not by making the federal constitutional protection directly applicable. (*Steele* v. *L. & N. R. Co., supra,* 323 U.S. 192, 202 [89 L.Ed. 173, 183] [the RLA imposes upon the statutory representative of a craft at least as exacting a duty to protect equally the interests of the members of the craft as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates].)

Justice Gibson declared: 'Where a union has, as in this case, attained a monopoly of the supply of labor . . . such a union occupies a quasi public position similar to that of a public service business and it has certain corresponding obligations. It may no longer claim the same freedom from legal restraint enjoyed by golf clubs or fraternal associations. Its asserted right to choose its own members does not merely relate to social relations; it affects the fundamental right to work for a living.' (25 Cal.2d [721] 731.) [¶] As Chief Justice Gibson explained, a union's legal obligations under such circumstances flowed from the long-established common law doctrine [. . .] which prohibited the holder of monopoly power from using its power in an arbitrarily discriminatory fashion. . . ." (*Gay Law Students, supra,* 24 Cal.3d 458, 481-482, bracketed additions and deletions ours.)

The *Marinship* stand of the *Gay Law Students* decision also imposed no further obligation on the public utility than to refrain from arbitrary discrimination. That common law duty arising out of "monopoly" concepts, moreover, cannot aid Pasillas or Navarro because they do not assert that the UFW's actions under the union security agreements here in question were arbitrary.

IV

We next consider whether the Board abused its discretion in concluding that the UFW's rule requiring a member to respect its strikes and picket lines (see fn. 4, *ante*) was a "reasonable" term or condition within the meaning of section 1153, subdivision (c), and hence a permissible basis for Navarro's discharge.[22] For reasons which follow, we believe that the Board misconceived its role under the Act and therefore conducted an incomplete review of "reasonableness."

As discussed in part I of this opinion, the ALRA and NLRA approach the matter of union security in essentially the same manner, first guaranteeing broad rights to engage in or refrain from concerted organizational activity and then allowing authorized union security agreements to interfere with the "right to refrain." Next, both acts provide a grace period for satisfying membership requirements — 30 days for the NLRA and 5 days for the ALRA.[23] (29 U.S.C. §§ 157, 158(a)(3); ALRA §§ 1152, 1153, subd. (c).)

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[22]We consider this important issue even though it is merely one alternative basis upon which Navarro's petition could have been resolved. (See part VI of this opinion, *post*.)

[23]The shorter time period for the state Act was necessitated by the "transient, often short-term nature of agricultural employment. . . ." (Levy, *supra*, at p. 790.)

The crucial point of departure is in each act's treatment of the concept of "membership" as such term is relevant to potential loss of employment. Section 158(a)(3) of the federal act states in its second proviso that no employer is justified in discriminating against an employee for nonmembership in a union if he has reasonable grounds for believing either that (1) "such membership was not available to the employee on the same terms and conditions generally applicable to other members" or that (2) "membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership; . . ." Section 1153, subdivision (c), of our state Act shares the NLRA's concern for uniform application of internal union rules, defining "membership" as the satisfaction of only "terms and conditions [which are] uniformly applicable to other members . . . ."

However, there are fundamental differences between the NLRA and the ALRA treatment of union security. First, rather than limit discharges to dues-and-fees grounds, the ALRA sanctions discharge where loss of good standing is based on failure to satisfy "reasonable terms and conditions" of membership. Thus, violation of any uniformly applicable term or condition may result in loss of employment if that term or condition is "reasonable." The federal language does not contain a reasonableness requirement. Second, the following compound proviso is added to the ALRA. "[S]uch membership shall not be denied or terminated except in compliance with a constitution or bylaws which afford full and fair rights to speech, assembly, and equal voting and membership privileges for all members, and which contain adequate procedures to assure due process to members and applicants for membership." (§ 1153, subd. (c).)

The scheme of section 1153 may be summarized in this way. By going beyond the present federal dues-and-fees limitation, the ALRA creates a situation analogous to the closed shop under the pre-1947 Wagner Act. The union "uses its owns membership standards as a basis on which to exclude [or terminate] men from employment." (*Wallace Corporation v. Labor Board* (1944) 323 U.S. 248, 268 [89 L.Ed.216, 233, 65 S.Ct. 238], dis. opn. of Jackson, J.) (14), (See fn. 24.) However, unlike the Wagner Act, which denied the NLRB "any power to supervise union membership or to deal with union practices, however unfair they may be to members [or] applicants, . . ." *(ibid.),* section 1153 bridles union membership standards with the requirement of reasonableness and grants the Board intrusive powers of review over internal disciplinary matters whenever the discipline results in loss of good standing and the concomitant threat of discharge under a union security agreement.[24]

The Board in the case before us examined the disciplinary proceedings for compliance with a union "constitution" affording "full and fair rights" and "adequate procedures to afford due process" to the workers, as the statute directs. That is, it reviewed the fairness of the proceedings by internal union standards.[25] What is disputed is the Board's finding of reasonableness.

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[24]This supervisory power of the Board exists only where the ultimate sanctions of suspenston or expulsion are imposed. Any disciplinary action short of that will not support loss of employment and hence Board review under section 1153, subdivision (c). Neither worker-petitioner in these cases disputes a union's right to impose those lesser disciplinary sanctions for strikebreaking. (*NLRB* v. *Allis-Chalmers Mfg. Co., supra,* 388 U.S. 175, 182-186 [18 L.Ed.2d 1123, 1129-1131, 87 S.Ct. 2001].)

[25]Navarro took the position at oral argument that the "full and fair rights to speech, assembly, and equal voting and membership privileges" mentioned in the statute (§ 1153, subd. (c)) refer only

The Board stated, "In this case, the question is whether the UFW's requirement regarding the honoring of picket lines and strikes is *reasonably related to a legitimate union interest that is germane to its role as collective bargaining representative.* We are convinced that the ability to enforce disciplinary rules during a strike is necessary for a union to be able to carry out its duties as the . . .employees' representative."[26] (Italics added; fns. omitted.) The standard employed (italicized above) was drawn from expressions in *Steelworkers* v. *Sadlowski* (1982) 457 U.S. 102, 121 [72 L.Ed 2d 707, 721, 102 S.Ct. 2339], and *Pinsker* v. *Pacific Coast Society of Orthodontists* (1974) 12 Cal.3d 541, 558 [116 Cal. Rptr. 245, 526 P.2d 253]. Navarro contends, and we agree, that the Board's use of that standard, without further inquiry, was an abuse of discretion.

At issue in *Steelworkers* v. *Sadlowski* was the meaning of the term "reasonable" as used in section 101(a)(2) of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), commonly known as the Landrum-Griffin Act (29 U.S.C. § 401 et seq.). That section, part of the LMRDA's "Bill of Rights" for union members, grants enumerated freedoms of speech and assembly in internal union matters but,

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to internal procedural fairness and not to limits on the reasonableness of a disciplinary charge itself. That position accords with the view of one commentator who was close to the act in its formation: "This provision appears to have been designed to encourage internal union democracy and to require that a labor organization negotiating union security agreements adhere to certain basic democratic principles." (Levy, *supra*, at p. 791; see mention of Mr. Levy's role in *Highland Ranch* v. *Agricultural Labor Relations Bd.*, *supra*, 29 Cal.3d 848, 860.)

[26]This reasoning and conclusion, while stated in the initial decision in the consolidated cases of Pasillas, Martinez and Scarbrough, were evidently relied on in Navarro's case, issued the same day. Board member McCarthy, in his dissent, disagreed with both the standard of reasonableness employed by the majority and the conclusion reached. (See fn.7, *ante*.)

in a proviso, leaves unimpaired a union's right to adopt and enforce "reasonable rules" as to a member's responsibilities toward the union.[27] Noting that a union rule in *Sadlowski* prohibiting candidates for union office from accepting campaign contributions from nonmembers might interfere with rights which Congress intended to protect by the LMRDA, the United States Supreme Court, nevertheless held the rule valid as "rationally related to a legitimate and protected [union] purpose, and thus . . . sheltered by the proviso to § 101(a)(2)." (457 U.S. 102, 121 [72 L.Ed.2d 707, 721].)

Pinsker v. *Pacific Coast Society of Orthodonists,* a California Supreme Court decision, involved the common law fair procedure right of an individual to be free of "arbitrary" rules of a private organization to which he or she belongs or aspires to belong. The standard announced in *Pinsker* was that enforcement of a rule would not be prohibited unless it was either "contrary to established policy" or "so 'patently arbitrary and unreasonable' as to be 'beyond the pale of the law.' " (12 Cal.3d 541, 558.) Under that standard, a rule not allowing an orthodontist to delegate his services or operations to one less qualified than himself

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[27]LMRDA section 101(a)(2) (29 U.S.C. § 411(a)(2) provides: "Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided,* That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations."

where orthodontic competence was required was held reasonable. *(Id.,* at pp. 558-559.)

The Board, in finding the UFW requirement regarding the honoring of picket lines and strikes "reasonably related to a legitimate union interest," fulfilled only a portion of its obligation to determine reasonableness.[28] We hold that the Board must not only determine (1) whether the rule is reasonable in its relation to legitimate union goals and functions, but also (2) whether the application of the rule to impose the sanction of suspension or expulsion is reasonable in the particular case at hand after balancing union interests and the interests of the worker.

It is important to remember the severe consequences of a union rule violation under the ALRA. Unlike the federal act, the ALRA equates all loss of good standing with the threat of firing. Thus, violation of an internal union rule may result not only in loss or suspension of membership, the ultimate internal sanctions, but also in loss of employment, a potentially crippling external sanction. Depending upon the strength and success of the certified representative union at the time and the prevalence of union security provisions in its collective bargaining agreements, loss of employment and good standing could mean loss of a worker's fundamental right to work for a living. (Cf. *James* v. *Marinship Corp., supra,* 25 Cal.2d 721, 731.)

Thus the context in which the word "reasonable" appears is particularly important, for it is found in a special definition of "membership" applicable only where loss of employment under a union security provision is at stake. The

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[28]We agree that the UFW's rule against strikebreaking and crossing picket lines is valid by the *Sadlowski/Pinsker* standard devised and applied by the Board, and we assume from lack of argument to the contrary that all parties herein agree that such an intrinsic standard of reasonableness must, as a threshold matter, be met.

Board has authority under subdivision (c) to scrutinize union disciplinary proceedings *only* where loss of good standing has occurred. The Board's analogy to the situation under the LMRDA, as explored in the *Sadlowski* decision, for example, where review of disciplinary proceedings is available for lesser sanctions, is not persuasive. Loss of employment was not and could not have been at issue in *Sadlowski* because under the federal scheme firing could only occur for nonpayment of dues and fees, not for other rules violations. For that reason, too, the court in *Sadlowski* was able to announce a fixed holding of reasonableness applicable to all future cases in which the campaign contribution rule was at issue, without regard to possible factual variations. The hardship endured by candidates for union office, that is, denial of outside campaign contributions, would remain fairly constant from case to case and would never jeopardize rights enjoyed beyond the internal workings of the union itself. Neither the severe consequence of firing nor the variable hardships which the firing might entail were factors relevant to the definition of "reasonable."

Further, the context of the instant cases also makes resort to the *Pinsker* standard of arbitrariness insufficient alone. There would have been no need to insert the word "reasonable" in the statute if it was thought that common law notions of fair procedure would apply in any event. The word "reasonable" would therefore seem to go beyond the common law protections addressed in *Pinsker*.

The preenactment history of the ALRA also supports an expanded review for reasonableness. As originally drafted, the Act would have mirrored the dues-and-fees limitation of the NLRA. Its present union security language is the product of a compromise agreement between representatives of the UFW and various growers reached in early May of 1975, about one month before the legislation was signed

into law. (Assembly Committee Hearing, *supra,* at pp. 4, 17, 37, 45; Author's Amend. to Sen. Bill. No. 813 (1975-1976 Reg. Sess.) May 6, 1975; Author's Amend. to Assem. Bill No. 1533 (1975-1976 Reg. Sess.) May 5, 1975.) As part of those changes, the dues-and-fees limitation was dropped in favor of the open-ended "reasonable terms and conditions" language, and internal union disciplinary proceedings resulting in loss of good standing were made reviewable by the Board. In a public hearing before the Senate Industrial Relations Committee, then Secretary of Agriculture and Services (now Chief Justice) Rose Bird explained the trade-off evident in subdivision (c): "[T]hat was part of the compromise, that if the labor organization wanted to have the economic power . . . they also had to give to the board the power to look into their internal organization and their internal workings *to insure that those were fair and comported with due process.*" (Italics added.) (Hearing before Sen. Ind. Rel. Com. on Sen. Bill No. 1 (Third Ex. Sess., May 21, 1975 [hereinafter Senate Committee Hearing] p. 73.)

In response to strong criticism at the Senate committee hearing that the amended language left too little protection for workers disciplined on grounds other than nonpayment of dues and fees, Secretary Bird repeatedly emphasized that the Board's review powers would be exercised to insure fairness and due process, saying, "[T]he people who read this language and become concerned about the membership clause tend to fail to read the latter part of that because I think it is very important language, and it is new, and something that has never been done in any other legislation, . . . [¶] [That language] gives to the Board the power to look into the internal workings of every labor organization that files under this Act and has any kind of activity wherein there is a complaint lodged against the labor organization because they are asking one of their members to do

something that does not comport with *fairness* and with *due process.* Now, that is a tremendous power that labor organizations traditionally have never been willing to give ... to a board, ..." (Senate Committee Hearing, *supra,* at p. 71; italics added.) Secretary Bird continued by way of a hypothetical: "[I]f there were an objection raised by a grower or a member of a labor organization, that the labor organization was not comporting with due process ... the General Counsel would look into it and *the board would make a determination as to whether or not, in fact, it was fair.* So you have a tremendous power in here that you have given to the board *to insure that the labor organization acts fairly,* and I think in a lot a ways this amendment is an improvement upon the original bill." (*Id.,* at p. 74; italics added.)

It is clear to us that one purpose of the amendments to subdivision (c) of section 1153 was to give the Board power to oversee the substantive fairness of expulsions or suspensions, not simply to insure mechanical compliance with a union constitution or bylaws, as one reading of the literal language might suggest.[29] For example, the Board surely would not abdicate its review function if it found that the union's constitution or bylaws afforded little or no protections; it would impose those protections. Moreover, it is evident that the Board was meant to give meaning to the phrase "reasonable terms and conditions" on a case

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[29]At the Senate Committee hearing, Attorney Jordan Bloom illustrated how empty a protection mere adherence to a constitution and bylaws could be: "You can ... have a labor organization that has all the due process in the world. They have votes; they have meetings; everyone gets to say what they want to say; they take a vote and they say that anyone [who] didn't go to the demonstration is not in good standing and he's out. The decision was arrived at in a democratic way, but why should the employer be told to fire that guy because he preferred to work?" (Senate Committee Hearing, *supra,* at pp. 74-75.)

by case basis. Assemblyman Howard Berman, a coauthor of the legislation, clearly indicated that the Board must give life to the term "reasonable": "[W]hat is the reason why an employee under a union security agreement keeps up his membership dues? Well, presumably . . . he is afraid of losing his job if he doesn't maintain his membership. The Board under this law has the authority to determine whether the reason that an individual is expelled from his union is unreasonable. . . ." (Hearing before Assem. Ways and Means Com. on Agric. Lab. Rel. Act (Third Ex. Sess., May 27, 1975) p. 21; c f. Levy, *supra,* at p. 791 ["The exact parameters of these 'membership requirements' will have to be decided by the ALRB."].) There was even some question in committee whether the Board would exercise its authority so as to sanction expulsion or suspension for other than due-and-fees grounds.[30]

The foregoing history of the Act together with its actual language dictates our conclusion that terms and conditions of employment are not to be deemed "reasonable" merely by reference to the intrinsic standard employed in the instant cases. If the only inquiry were whether a rule is "reasonably related to a legitimate union interest that is germane to its role as a collective bargaining representative," then very few rules would be found unreasonable and

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[30]"JORDAN BLOOM: Why should the board have the authority to sanction the discharging of an employee for some reason other than a failure to tender dues or initiation fees?

"SENATOR GREENE: How do you know the board is going to do that?

"JORDAN BLOOM: It has the authority to do that in this law.

"SENATOR GREENE: How do you know that it is going to make its determination in that direction rather in some other?

"JORDAN BLOOM: Why should it even have the authority to make that determination? That's my point.

the slightest legitimate union interest would always outweigh the worker's fundamental right to work for a living. This cannot have been the intent of the Act, as is evident from the concern expressed before and within the committees that considered the amendments.

We hold that, in cases of expulsion or suspension placed before the Board pursuant to section 1153, subdivision (c), review, an internal rule forming the basis for the underlying charge shall be deemed a "reasonable" term or condition of membership only if the Board determines (1) that the rule is reasonable in its relation to legitimate union goals and functions, and (2) that, after balancing union interest and the interests of the worker, application of the rule is reasonable in the particular case at hand. In determining that the rule is reasonable in its application, the Board must find that no less severe sanction than suspension or expulsion will, in that particular case and under the circumstances existing at the time of the disciplinary action, be effective to serve the union interests advanced by the rule.[31]

While the precise dimensions of the test must be left within the discretion of the Board, to be exercised in light of its evolving experience and expertise, the following nonexclusive factors should prove to have general relevance in the balance of the union's interests against the worker's rights. The union's interest might include, for example, the need for conformance with the rule, the importance of the

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"SENATOR GREENE: Well, I can tell you why it should have the authority as one vote on the bill. Because we decided to give it to them." (Senate Committee Hearing, *supra*, at p. 77.)

[31]We emphasize that the test announced above is not the equivalent of a constitutional standard. Although the test requires examination of less restrictive alternatives, there is no requirement of a compelling union or governmental interest. (Cf. *Steelworkers* v. *Sadlowski*, *supra*, 457 U.S. 102, 111 [72 L.Ed.2d 707, 715].)

goal which conformance serves, the threat to union solidarity imposed by the violation, the frequency and seriousness of such violations in general and as to the particular worker, and the probable curative effect of lesser sanctions than expulsion or suspension. Factors affecting the worker's interests might include his or her ability to find other employment, financial or other hardship which might have prompted the worker to violate the rule, the worker's awareness of wrongdoing and willingness to abide by the rule in the future, his or her tenure or other interests in maintaining present employment and the number or frequency of past rules violations. Should the Board determine that the rule in its application is not "reasonable," it may find it appropriate to return the member to the union's disciplinary processes for imposition of a lesser sanction so as not to deprive the union of all recourse against the worker.

V

Impliedly conceding that the Board has discretion to determine when a member's failure to exhaust internal union review procedures will be excused, the Union contends that the Board abused that discretion in the case of Martinez by applying an assertedly inapposite test, culled from federal law, to excuse Martinez's failure to pursue an appeal to the PRB before filing charges under the ALRA.

As an extension of the doctrine of exhaustion of administrative remedies, which generally makes resort to administrative procedures a jurisdictional precondition to seeking relief in the courts, a union member must in the usual case avail himself of all appropriate intraunion remedies before seeking judicial relief. (*Holderby v. Internat. Union etc. Engrs.* (1955) 45 Cal.2d 843, 846 [291 P.2d 463].) We hold that this principle similarly requires exhaustion of intraunion remedies before seeking administrative relief under the ALRA. The Board and the Union agree that such is the general rule.

Martinez appealed his trial action to the Union's NEB, obtaining a reduction of his expulsion to a one-year suspension, but did not pursue his further right of appeal to the PRB, the next and final intraunion review level. (See fn. 5, *ante.*)

Applying a three-part test borrowed from the United States Supreme Court opinion in *Clayton* v. *Automobile Workers* (1981) 451 U.S. 679 [68 L.Ed.2d 538, 101 S.Ct. 2088][32] the Board excused Martinez's failure to appeal to the PRB for the reason that the PRB could not have provided him an adequate remedy. The Union now strenuously argues that the *Clayton* case, dealing as it does with employee actions under section 301(a) of the Labor Management Relations Act (LMRA) (See fn. 32, *ante*), is grounded on policy considerations not present in the instant case and that the exhaustion exceptions there enumerated are for that reason inapplicable. The proper rule, urges the Union, is that expressed in *Holderby* v. *Internat. Union etc. Engrs., supra,* 45 Cal.2d 843, at page 847: "It is only when the organization violates its rules for appellate review or upon a showing that it would be futile to invoke them that the further pursuit of internal relief is excused."

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[32]In the context of an employee action brought under LMRA section 301(a) (29 U.S.C. § 185(a)) for breach of a collective bargaining agreement, the court in *Clayton* stated: "[C]ourts have discretion to decide whether to require exhaustion of internal union procedures. In exercising this discretion, at least three factors should be relevant: first, whether union officials are so hostile to the employee that he could not hope to obtain a fair hearing on his claim; second, whether *the internal union appeals procedures would be inadequate . . . to award him the full relief he seeks* under § 301; and third, whether exhaustion of internal procedures would unreasonably delay the employee's opportunity to obtain a judicial hearing on the merits of his claim. If any of these factors are found to exist, the court may properly excuse the employee's failure to exhaust." (Italics added; *Clayton* v. *Automobile Workers, supra,* 451 U.S. 679, 689 [68 L.Ed.2d 538, 548-549].)

We find it unnecessary to decide whether the full three-part *Clayton* test for excusing exhaustion applies to these proceedings, for the part of that test relied on by the Board — inadequacy of remedy — is also a firmly established exception to the exhaustion doctrine under *California* law. (19) "It is settled that the rule requiring exhaustion of administrative remedies does not apply where an administrative remedy is unavailable [citation] or inadequate [citation]." (*Tiernan* v. *Trustees of Cal. State University & Colleges* (1982) 33 Cal.3d 211, 217 [188 Cal.Rptr. 115, 655 P.2d 317], and cases cited; *Farmer* v. *City of Inglewood* (1982) 134 Cal.App.3d 130, 137 [185 Cal.Rptr. 9].) (16c) Thus, there was no abuse of discretion in selection of the standard.

Further, on the merits of the Board's application of the inadequacy exception to the facts of Martinez's case, we find no abuse of discretion. Under provisions of the UFW Constitution, Martinez's penalty of expulsion was automatically stayed pending his NEB appeal, but not pending a further appeal to the PRB. (See fn. 5, *ante*.) Thus, the NEB decision of January 2, 1980, rendered the then-reduced penalty of suspension effective immediately, and Martinez was accordingly discharged from his employment at Mann Packing on January 14, for being in "bad standing." His discharge was within the 15-day time period in which he could have appealed to the PRB. (UFW Const., art. XX, § 4(b)). Instead of invoking PRB review, however, Martinez immediately filed unfair labor practice charges against the Union and Mann Packing.

Like the Board, we conclude that once Martinez had been discharged, his PRB appeal remedy was no longer adequate to assure him full relief. Successful PRB review might have resulted in Martinez being ordered restored to union membership in good standing. However, as far as we are aware, nothing in the UFW Constitution or in the collective bargaining agreement with Mann Packing empowered the PRB

to compel Mann Packing to reinstate him to his former job and seniority. Under those circumstances, while Mann packing might have *chosen* to so reinstate Martinez upon restoration of his good standing, only the Board could have *ensured* that remedy.

In an analogous case, *Tiernan* v. *Trustees of Cal. State University & Colleges, supra,* a university employee who had been denied reappointment filed a formal grievance in accordance with established internal procedures designed for the resolution of employee-university disputes but did not fully pursue those procedures before seeking writ of mandate relief in superior court. Her claims were based in part on the defendant trustees' alleged duty to adopt and follow regulations regarding notice of nonreappointment, as required by Education Code section 89534. (33 Cal.3d 211, 214-217.) The Supreme Court held that claims premised on the alleged statutory duty were not barred by the exhaustion doctrine because the rules governing the grievance procedures provided no avenue for advancing the contention. One rule placed matters which required rule formulation and adoption by the trustees beyond the scope of grievance resolution, and another rule specifically enjoined the grievance committee from recommending required changes in the trustees' rules and policies. In light of those rules, the court in *Tiernan* concluded that, insofar as the employee's action sought to compel the trustees to adopt the notice regulations, it was not barred; similarly, to the extent that she claimed "a right to reinstatement or back pay by virtue of the trustees' failure to adopt such regulations," her action was not barred. *(Id.,* at pp. 217-218.) "The doctrine of exhaustion of administrative remedies does not require a litigant to present his or her claim to an administrative body powerless to grant relief." *(Id.,* at p. 218.)

We hold that the intraunion PRB appeal procedure was inadequate to afford the full relief sought by Martinez and, hence, that Martinez was properly excused from exhausting that procedure. We are not persuaded by the Union's argument that, because PRB relief had in the past sometimes resulted in an employer fully reinstating a member voluntarily, the PRB procedure was thereby rendered adequate for purposes of exhaustion. Martinez was not required to protract the hardship of his unemployment in reliance on the charity of his former employer.[33]

VI

Like Martinez, Navarro was excused by the Board for her failure to pursue PRB review. The Union contends that the Board abused its discretion.

Navarro's union trial was held on October 1, 1980. Her November 11 appeal to the NEB was rejected as untimely because not taken within 15 days of the trial and, presumably, because a discretionary extension of the appeal time in "the interest of justice" was not found warranted.[34] Consequently, Navarro's two-year suspension was not stayed, and she was fired at the Union's request. Appeal to the PRB was not taken and, owing to the NEB's discretionary refusal to accept jurisdiction, was no doubt unavailable in any

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[33]Were the facts different, the PRB remedy might have been adequate – for example, had the Union agreed to forestall requesting dismissal pending PRB review.

[34]Article XX, section 1(b), of the UFW Constitution provides: "[W]ritten appeal [to the NEB] must be mailed to the Secretary-Treasurer within 15 days of the date of the trial. The 15-day time limit provided in this Section for filing appeals from the decisions of trial courts may be extended at the discretion of the National Executive Board, for a period not to exceed thirty (30) days, when the Board determines that such extension would serve the interest of justice; . . ."

event. She filed unfair labor practice charges against the UFW but not against her employer.

Noting that the stipulated facts in Navarro's case showed a particularly egregious violation of her due process rights under the UFW Constitution and citing *Libutti* v. *Di Brizzi* (2d Cir. 1964) 337 F.2d 216, the board held that Navarro's failure to exhaust internal remedies did not warrant deferring consideration of her case. It then found that strikebreaking charges had been preferred against her nearly a full year after her accuser became aware of her alleged offense — well beyond the applicable 60-day time limitation; that two extensions of time constitutionally authorized by UFW President Cesar Chavez (art. XVIII, § 8) affected only the time period for holding trials, not for preferring charges; and that the extensions came too late in any event.

We do not pass on the question whether the seriousness of an internal rule violation may alone justify excusing a member's failure to exhaust internal remedies. (Cf. *Libutti* v. *Di Brizzi, supra,* 337 F.2d 216, 219, [exhaustion not required where conceded facts show serious violation of a fundamental right], with *Holderby* v. *Internat. Union etc. Engrs., supra,* 45 Cal.2d 843, 847 [a violation of a union's own rules which inflicts the initial wrong furnishes no right for direct resort to the courts].)

Instead, we hold that under the circumstances of Navarro's having attempted to utilize internal procedures and the NEB's *discretionary* refusal to exercise jurisdiction in the face of an egregious internal rule violation affecting her due process rights, the Board's decision to excuse exhaustion was not an abuse of discretion. We note that the Union does not dispute the merits of the Board's due process ruling and thus apparently concedes that the strikebreaking charges were untimely filed. It would be ironic to allow

the Union to strictly enforce its discretionary time limitation against a member whose rights it concededly violated by a far more lengthy and prejudicial delay.

VII

Key to Pasillas' case, too, is the issue of failure to exhaust intraunion appeals procedures. Pasillas did not attend his union trial of October 2, 1979, despite notice. Further, he failed to avail himself of either NEB or PRB review, and there was consequently no stay of his disciplinary expulsion. He was discharged by his employer at union request on November 2d and thereafter filed unfair labor practice charges against his employer and the UFW. The Board found his failure to exhaust intraunion appeals procedures unexcused and accordingly dismissed his allegations from the consolidated complaint. We find no abuse of discretion in that decision.

Pasillas does not contend that he had inadequate notice of the trial or appeal procedures but suggests that internal review would have been, first, futile because the union "controlled" the NEB and PRB and, second, inadequate because those review bodies lacked power to compel his employer to rehire him and thus remedy his discharge. However, he made no showing whatsoever that any of the NEB or PRB members were biased or had prejudged his case, and the successes of Scarbrough and Martinez belie any suggestion that the NEB would have been unreceptive to his claims as a matter of course. The cases cited by Pasillas are distinguishable on that basis.[35] Further, Pasillas forgets that an NEB appeal would have automatically stayed his expulsion and prevented his discharge in the first place

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[35]See *Glover* v. *St. Louis-S. F. R. Co.* (1969) 393 U.S. 324, at pages 330 to 331 [21 L.Ed.2d 519, at page 524, 89 S.Ct. 548] (failure to fully exhaust contractual remedies excused as futile upon allegations that petitioners' bargaining representatives had contrived with employer to bar petitioners promotions); *Steele* v. *L. & N. R. Co.*,

so that reinstatement to employment — a claimed inadequacy in the internal remedies — would have been unnecessary.

Next, Pasillas relies on case law and legislative intent regarding LMRDA section 101(a)(4),[36] and argues that its provisions should apply by virtue of what he terms the ALRA's command to follow applicable "federal precedents" (see § 1148). We reject the idea for two reasons. First, section 1148 of our Act speaks of "applicable precedents of the National Labor Relations Act, as amended," not of "federal precedent" in general. While certain provisions of the LMRDA effected amendments to sections of the LMRA, which comprises chapter 7 of title 29 of the United States Code (see 29 U.S.C. § 141(a)), the LMRDA provision here in question is found, not in chapter 7, but in chapter 11 (29 U.S.C. §§ 401-531). In short, the provision is not part of the NLRA (or LMRA) (see fn. 8, *ante*). Second, federal precedent as to LMRDA section 101(a)(4) would not be "applicable" in any event because our Act does not contain a

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supra, 323 U.S. 192, at pages 205-207 [89 L.Ed. 173, at pages 184-186] (individual grievances brought by railroad employees against their representatives were judicially cognizable where administrative boards would entertain only union-brought (rather than individual) complaints, were chosen by respondent representatives, and had definitely ruled against the employees on the issue in dispute).

[36]LMRDA section in 101(a)(4) (29 U.S.C. § 411(a)), part of the "Bill of Rights of Members of Labor Organizations" (29 U.S.C. §§ 411-415), states in pertinent part: "No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency, . . . : *Provided*, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof: . . ."

parallel provision. Furthermore, our Act's policy favoring internal resolution of disciplinary disputes (see fn. 39, *post*) is most clearly evident in section 1153, subdivision (c), which, as has been discussed at length herein, is without parallel in the NLRA and which therefore demands an independent assessment of exhaustion policy.

Finally, the LMRDA does not by its own terms apply to agricultural employees. Pasillas argues that the LMRDA definition of "employee" (29 U.S.C. § 402(f)) which, unlike the parallel LMRA definition (29 U.S.C. § 152(3)), does not specifically exclude agricultural laborers, evinces a congressional intent to make provisions of the LMRDA applicable to employees covered by our state Act. However, it seems more likely that the broader LMRDA definition was chosen to accommodate that act's intended coverage of employees under both the LMRA and the RLA. The LMRDA contains this statement: "The Congress ... finds and declares that the enactment of this chapter is necessary to eliminate or prevent improper practices on the part of labor organizations, employers [etc.] which distort and defeat the policies of the Labor Management Relations Act, 1947, as amended, and the Railway Labor Act, as amended, ..." (29 U.S.C. § 401(c).)

Even if the LMRDA did apply, it would not prevent the Board from requiring a member to exhaust reasonable internal procedures for up to four months. The LMRDA section which Pasillas seeks to invoke has been interpreted to allow an agency or court to, *in its discretion*, entertain an action or proceeding before four months time elapses, but not to prevent the agency or court from discretionarily requiring a member to exhaust internal union remedies of less than four months duration. (*NLRB v. Marine Workers* (1968) 391 U.S. 418, 426-428 [20 L.Ed.2d 706, 713-714, 88 S.Ct. 1717]; see fn. 36, *ante*.) Here the Board required

Pasillas to exhaust his remedies and found that he had invoked none of them. No abuse of discretion would appear. Moreover, legislative history reveals that LMRDA section 101(a)(4) was not intended to invalidate state court decisions requiring exhaustion of internal remedies, so long as those requirements are reasonable. (*Id.*, at pp. 427-428 [20 L.Ed.2d at p. 714].) Therefore, the LMRDA is neither available nor helpful to Pasillas.

At oral argument, Pasillas asked that if exhaustion of intraunion remedies be held required, the holding be made to operate prospectively, out of fairness, since the Act nowhere expressly requires intraunion exhaustion. However, the rule we apply here is by no means new and should have been expected. The *Holderby* decision (discussed in part V of this opinion, *ante*) established the general rule back in 1955, and its holding — which was squarely applied in a labor union dispute setting — remains valid today.

We hold that Pasillas' charges were properly dismissed for failure to exhaust. His remaining contentions, while adopted by Navarro and for that reason discussed herein, are therefore unavailing as to himself.

VIII

The UFW argues that there is insufficient evidence to support the Board's finding that Martinez was denied a fair hearing. The argument lacks merit.

Evidence in the form of Martinez's testimony clearly supports the Board's conclusion that he lacked a sufficient understanding of the trial processes to defend himself and, in particular, to cross-examine witnesses against him. Although Martinez protested his innocence throughout and had indicated a desire to defend himself, his conduct at the trial and his recollections afterward show that he was

unaware of or confused about his rights to call witnesses in his favor, to be represented by another member and to cross-examine witnesses against him.

The Union points to other evidence — that Martinez was informed of his rights to cross-examine witnesses, to invoke intraunion review and to have a coworker represent him — as undermining Martinez's "conveniently vague" memory on those points. However, Martinez's lack of understanding is not necessarily inconsistent with his having been mechanically informed of certain rights. The Board was entitled to give weight to Martinez's inability to read or write English, his virtual inability to read or write Spanish and the fact that he had completed just two years (or semesters) of school. Assertions by the Union that Martinez had a "conveniently vague" memory raise questions of credibility, as to which the Board's resolution is binding absent testimony which is incredible or inherently improbable. (*Montebello Rose Co.* v. *Agricultural Labor Relations Bd.* (1981) 119 Cal.App.3d 1, 20 [173 Cal.Rptr. 856].) The testimony here is not of that kind, and Martinez's self-interest in obtaining relief from the trial decision was simply a factor for the Board to consider in evaluating his testimony. (See *Martori Brothers Distributors* v. *Agricultural Labor Relations Bd.* (1981) 29 Cal.3d 721, 728-729 [175 Cal.Rptr. 626, 631 P.2d 60].)

We hold that the Board's finding that Martinez lacked sufficient understanding of the trial procedures — a question of fact based on the resolution of conflicts in the evidence and on credibility determinations — is supported by substantial evidence on the record considered as a whole. The finding is therefore conclusive. (§ 1160.8; *Martori Brothers Distributors* v. *Agricultural Labor Relations Bd., supra,* 29 Cal.3d 721, 727-728.)

IX

Lastly, the UFW challenges the Board's supplemental decision, by which Scarbrough's estate was ordered made whole for all losses suffered as the result of both his 1979 layoff *and* his 1980 discharge.[37] The Board had previously ordered allegations of Scarbrough's complaint relating to the 1980 discharge dismissed on the ground that the UFW had restored Scarbrough to good standing, had successfully requested his reinstatement to employment at Sun Harvest and had admitted its obligation to make Scarbrough whole. However, upon reconsideration, the Board vacated its prior order and concluded that both the layoff and the later discharge constituted unlawful discrimination under section 1154, subdivision (b), of the Act. (See fn. 10, *ante*.) In doing so, the Board adopted the ALJ's findings with regard to both acts of discrimination, adding: "To the extent the ALJ's Decision is unclear, however, we find that the UFW conceded the lack of adequate due process at Scarbrough's trial in the decision of its [PRB]."

The UFW complains that the supplemental decision — in effect finding PRB relief inadequate after the Board had previously found the same relief adequate — shows, first, inconsistent application of the exhaustion doctrine and, second, unfair use of the PRB, intraunion remedy as proof of an unfair labor practice. This, it is claimed, subverts the purposes of the Act by discouraging union compliance with section 1153, subdivision (c), due process requirements.

We find no misapplication of the exhaustion doctrine or subversion of legislative purpose. In fact, the supplemental decision was issued by the Board in order to conform its

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[37]The Union apparently does not dispute that part of the decision, carried over from the initial decision, that the 1979 layoff constituted a violation of the Act by the Union.

action to the plain requirements of the Act: The Board had initially reasoned as follows: "Since the UFW concedes it is obligated to make Scarbrough whole for any losses he may have suffered as a result of his discharge, and since Scarbrough is free to seek judicial enforcement of that obligation, there is no need for this Board to maintain its jurisdiction over the matter." In this first decision, the Board in essence found an unfair labor practice in the 1980 discharge (as had the ALJ) but, out of deference to the Union's internal PRB processes, declined to issue a remedial order. However, as Scarbrough correctly pointed out in his motion for reconsideration, section 1160.3 of the Act does not give the Board the option of declining jurisdiction once it has found an unfair labor practice. In response to that argument, with which the ALRB General Counsel concurred, the Board conformed its disposition to the Act's directive by issuing a remedial order, thus retaining jurisdiction.

In mandatory language, section 1160.3 specifies two options open to the Board upon hearing allegations of an unfair labor practice. Upon finding an unfair labor practice by a preponderance of the testimony, the Board "*shall issue . . . an order* requiring [the violator] [1] to cease and desist from such unfair labor practice, [2] to take affirmative action, including reinstatement of employees with or without backpay, and making employees whole, when the board deems such relief appropriate, for the loss of pay resulting from the employer's refusal to bargain, and [3] to provide such other relief as will effectuate the policies of this part. . . ." (Italics and bracketed material added.) Upon finding no violation, the Board "shall issue an order dismissing the complaint. . . ." The section thus authorizes dismissal of a complaint only where no violation is found; in all other cases, a remedial order must issue. This being the express language of the section, it follows that the Board did not abuse its discretion in vacating its

prior disposition and issuing the remedial order. It would in fact have been an abuse of discretion and an abdication of statutory duty for the Board to have let the prior order stand.

Federal authority is in accord with this construction of the Act. The parallel provision of the federal Act, section 10(c) of the NLRA (29 U.S.C. § 160(c)),[38] has been held to require that the NLRB issue a remedial order — at the very minimum, a cease-and-desist order — once it has found a violation. (*International Union, U. A., A. & A. I., Wkrs. (UAW)* v. *N.L.R.B.* (6th Cir. 1970) 427 F.2d 1330, 1332-1334, and cases cited therein.)

We do not share the UFW's concern that the Board's issuance of remedial orders upon found unfair labor practices will discourage a union from providing effective review and remedies through its own internal mechanisms, a result which we agree would be at cross-purposes with the Act's evident policy of encouraging effective intraunion resolution of disciplinary disputes.[39] First, the prospect of avoiding the filing of charges under the Act will remain

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[38]Section 10(c) provides in pertinent part that, upon a finding of an unfair labor practice, the NLRB "shall issue . . . an order requiring [the violator] to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: . . ." Upon finding no violation, the NLRB "shall issue an order dismissing the said complaint. . . ."

[39]As discussed earlier in this opinion, subdivision (c) of section 1153 of the Act vests the Board with uniquely intrusive powers to look into internal disciplinary proceedings to insure that a union affords workers facing denial or termination of membership "full and fair rights to speech, assembly, and equal voting and membership privileges for all members" and "adequate procedures to assure due process" as guaranteed by a union's constitution and bylaws. The UFW Constitution's PRB and NEB review procedures are, of

a constant impetus on both sides for seeking effective internal resolution of disputes. Second, once the Board has jurisdiction and has found an unfair labor practice, its remedial order need not immediately direct all possible affirmative action but may, when appropriate, leave room for remedial measures already in progress while at the same time reserving jurisdiction should those measures fail.[40] This latter course is consistent with the Board's responsibility to fashion relief which will, according to the directive of section 1160.3, "effectuate the policies" of the Act. (Cf. *Nish Noroian Farms* v. *Agricultural Labor Relations Bd.* (1984) 35 Cal.3d 726, 745 [201 Cal.Rptr. 1, 677 P.2d 1170].)

In the case of Scarbrough, the Board was advised by General Counsel that the issue of calculating backpay had resulted in impasse, with the UFW attributing delay to Scarbrough's refusal to cooperate. Scarbrough, on the other hand, expressed his preference for a Board-formulated backpay award. That state of events presumably persuaded the Board, upon reconsideration, to affirmatively order Scarbrough made whole in accordance with computations established by ALRB precedent. Because the PRB remedy no longer appeared fully effective, the Board's

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course, calculated to remedy any violations of member/applicant rights, albeit after the fact, and as such are consonant with the Act's policy and deserving of respect from the Board where those remedies are effective. Also, internal union relief which makes the filing of unfair labor practice charges unnecessary is consonant with the Board's power to command affirmative action, which power is remedial rather than punitive. (*Sunnyside Nurseries, Inc.* v. *Agricultural Labor Relations Bd.* (1979) 93 Cal.App.3d 922, 940 [156 Cal.Rptr. 152].)

[40]Section 1160.3 provides in part: "Until the record in a case shall have been filed in a court, as provided in this chapter, the board may, at any time upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it."

supplemental order was not at all in tension with the Act's policies.

Moreover, as a practical matter apart from the Board's statutory duty to issue a remedial order, it is important that the Board retain jurisdiction for enforcement and prevention purposes rather than relegating a successful charging party to civil court processes. It is preferable and in keeping with the legislative purpose for the Board to bring its expertise to bear on supervision problems.[41] Also, the existence of an enforceable cease-and-desist order is far more expeditious for a charging party than having to start over again should continued or renewed violations occur. (*International Union, U. A., A. & A. I., Wkrs. (UAW)* v. *N. L. R. B., supra,* 427 F.2d 1330, 1333-1334.)

Finally, the UFW has no reason to protest the Board's use of the internal PRB decision as a "concession" of due process violations regarding Scarbrough's 1980 discharge. The UFW never disputed the discharge before either the ALJ or the Board. Rather, it disputed only the 1979 layoff and argued that questions as to the legality of its actions toward Scarbrough were mooted by the subsequent PRB relief. The 1980 discharge question was thus not preserved for Board review or this court's review. (*Nish Noroian Farms v. Agricultural Relations Bd., supra,* 35 Cal.3d 726, 737, 743.) We interpret the Board's allusion to the issue being "conceded" as meaning only that the issue was not disputed beyond the PRB review stage.

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[41]Section 1160.3 provides that where backpay is ordered, "[s]uch order may further require [the violating employer or union] to make reports from time to time showing the extent to which it has complied with the order. . . ."

DISPOSITION

We have rejected all of the petitioners' contentions challenging the Board's actions as to Pasillas, Martinez and Scarbrough. Real parties in interest Martinez and Scarbrough have not petitioned for review in their cases, petitioner Pasillas' failure to exhaust intraunion appeals procedures properly resulted in dismissal of his unfair labor practice allegations and petitioner UFW's challenges regarding all three of those parties lack merit. Accordingly, the order in 8 A.L.R.B. No. 103, as modified by the supplemental order in 9 A.L.R.B. No. 17, is ordered enforced in full. That part of the Board's decision in 8 A.L.R.B. No. 103, finding that the UFW rules here at issue were "reasonable" (a conclusion not challenged directly by Pasillas, but indirectly challenged by Navarro and apparently adopted and relied upon by the Board in Navarro's case), is disapproved insofar as it is inconsistent with this opinion.

The claims of Navarro concerning retroactive application of the union security provision and her free speech and association rights, as well as the UFW's exhaustion of remedies argument, all lack merit. To that extent, we agree with the Board's decision, although we have concluded that the Board misconceived the extent of its review function under section 1153, subdivision (c), of the Act and therefore never undertook to balance the need for the penalty of suspension. However, the Board's decision is upholdable on the basis of its due process ruling alone. The decision in 8 A.L.R.B. No. 104 is therefore affirmed, and the order is enforced in full.

Kline, P. J., and Rouse, J., concurred.

Appendix C

COURT OF APPEAL
OF THE STATE OF CALIFORNIA
in and for the
FIRST APPELLATE DISTRICT
DIVISION TWO
No. A021200
A021202
A021137
A021199
A022544

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8 ALBR No. 104

Maria G. Navarro,
Petitioner,
vs.
Agricultural Labor Relations Board,
Respondent,
United Farm Workers of America, AFL-CIO,
Real Party in Interest.

[Filed June 20, 1984]

BY THE COURT:
The petitions for rehearing are denied.

Dated June 20, 1984

KLINE, *P.J.*

Appendix D

ORDER DENYING HEARING
AFTER JUDGMENT BY THE COURT OF APPEAL
1st District, Division 2, No. A021137,
A021199, A021200, A021202, A022544
IN THE SUPREME COURT
OF THE STATE
OF CALIFORNIA
IN BANK

Pasillas, Petitioner,
v.
Agricultural Labor Relations Board, Respondent;
U.F.W. Of America, AFL-CIO et al.,
Real Parties in Interest.
(and related actions)
Bird, C.J. did not participate.

[Filed Aug. 8, 1984]

Petitioners' petitions for hearing DENIED.

ALLEN E. BRENNAN
Acting Chief Justice

Appendix E

IN THE SUPREME COURT
OF THE
STATE OF CALIFORNIA
No. ____
(1 Civ. No. A021202)
(8 ALRB No. 104)
Maria Guadalupe Navarro,
Petitioner,
v.
Agricultural Labor Relations Board,
Respondent,
and
United Farm Workers of America, AFL-CIO,
Real Party in Interest.

After the Final Order of the California Supreme Court Denying Hearing Following Decision of the California Court of Appeal for the First Appellate District

NOTICE OF APPEAL

RONALD A. ZUMBRUN
ROBIN L. RIVETT
Pacific Legal Foundation
455 Capitol Mall, Suite 600
Sacramento, California 95814
Telephone: (916) 444-0154

Attorneys for Petitioner
Maria Guadalupe Navarro

NOTICE IS HEREBY GIVEN that Maria Guadalupe Navarro, the petitioner above named, appeals to the Supreme Court of the United States from the final order of the California Supreme Court, August 8, 1984, denying her petition for hearing on the judgment of the California Court of Appeal, First Appellate District, entered May 24, 1984, and refusing her claims for relief under the First and Fourteenth Amendments to the United States Constitution.

The appeal is taken under the provisions of 28 U.S.C. § 1257(2).

DATED: October 17, 1984.

Respectfully submitted,

RONALD A. ZUMBRUN
ROBIN L. RIVETT

By ROBIN L. RIVETT

Attorneys for Petitioner
Maria Guadalupe Navarro

Appendix F

TEXT OF AMENDMENTS TO THE CONSTITUTION

AMENDMENT [I]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Appendix G

CALIFORNIA LABOR CODE § 1140.2

§ 1140.2. State policy

It is hereby stated to be the policy of the State of California to encourage and protect the right of agricultural employees to full freedom of association, self-organization, and designation of representatives of their own choosing, to negotiate the terms and conditions of their employment, and to be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. For this purpose this part is adopted to provide for collective-bargaining rights for agricultural employees.

Appendix H

CALIFORNIA LABOR CODE § 1152

§ 1152. Enumeration

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of continued employment as authorized in subdivision (c) of Section 1153.

Appendix I

CALIFORNIA LABOR CODE § 1153(c)

§ 1153. Employer; unfair labor practices

It shall be an unfair labor practice for an agricultural employer to do any of the following:

(c) By discrimination in regard to the hiring or tenure of employment, or any term or condition of employment, to encourage or discourage membership in any labor organization.

Nothing in this part, or in any other statute of this state, shall preclude an agricultural employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this section as an unfair labor practice) to require as a condition of employment, membership therein on or after the fifth day following the beginning of such employment, or the effective date of such agreement whichever is later, if such labor organization is the representative of the agricultural employees as provided in Section 1156 in the appropriate collective-bargaining unit covered by such agreement. No employee who has been required to pay dues to a labor organization by virtue of his employment as an agricultural worker during any calendar month, shall be required to pay dues to another labor organization by virtue of similar employment during such month. For purposes of this chapter, membership shall mean the satisfaction of all reasonable terms and conditions uniformly applicable to other members in good standing; provided, that such membership shall not be denied or terminated except in compliance with a constitution or bylaws which afford full and fair rights to speech, assembly, and equal voting and membership privileges for all members, and which contain adequate procedures to assure due process to members and applicants for membership.

Section 1153 Exclusionary Language

Nothing in this part, or in any other statute of this state, shall preclude an agricultural employer from making an agreement with a labor organization ... to require as a condition of employment, membership therein ....

Section 1153 Nonexclusionary Language

It shall be an unfair labor practice for an agricultural employer to do any of the following:

....

(c) By discrimination in regard to the hiring or tenure of employment, or any term or condition of employment, to encourage or discourage membership in any labor organization.

Appendix J

CALIFORNIA LABOR CODE § 1154(a)(1) AND (b)

§ 1154. Labor organization or agents; unfair labor practices

It shall be an unfair labor practice for a labor organization or its agents to do any of the following:

(a) To restrain or coerce:

(1) Agricultural employees in the exercise of the rights guaranteed in Section 1152. This paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein.

(b) To cause or attempt to cause an agricultural employer to discriminate against an employee in violation of subdivision (c) of Section 1153, or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated for reasons other than failure to satisfy the membership requirements specified in subdivision (c) of Section 1153.

Appendix K

CALIFORNIA LABOR CODE § 1160.3

§ 1160.3. Reduction of testimony to writing; order; contents; dismissal; modification of finding or order

The testimony taken by such member, agent, or agency, or the board in such hearing shall be reduced to writing and filed with the board. Thereafter, in its discretion, the board, upon notice, may take further testimony or hear argument. If, upon the preponderance of the testimony taken, the board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, the board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, to take affirmative action, including reinstatement of employees with or without backpay, and making employees whole, when the board deems such relief appropriate, for the loss of pay resulting from the employer's refusal to bargain, and to provide such other relief as will effectuate the policies of this part. Where an order directs reinstatement of an employee, backpay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If, upon the preponderance of the testimony taken, the board shall be of the opinion that the person named in the complaint has not engaged in or is not engaging in any unfair labor practice, the board shall state its findings of fact and shall issue an order dismissing the complaint. No order of the board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the

payment to him of any backpay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the board, or before an administrative law officer, thereof, such member, or such administrative law officer, as the case may be, shall issue and cause to be served on the parties to the proceedings a proposed report, together with a recommended order, which shall be filed with the board, and, if no exceptions are filed within 20 days after service thereof upon such parties, or within such further period as the board may authorize, such recommended order shall become the order of the board and become effective as therein prescribed.

Until the record in a case shall have been filed in a court, as provided in this chapter, the board may, at any time upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

Appendix L

CALIFORNIA LABOR CODE § 1160.8

§ 1160.8. Petition to modify or set aside board order; jurisdiction; procedure

Any person aggrieved by the final order of the board granting or denying in whole or in part the relief sought may obtain a review of such order in the court of appeal having jurisdiction over the county wherein the unfair labor practice in question was alleged to have been engaged in, or wherein such person resides or transacts business, by filing in such court a written petition requesting that the order of the board be modified or set aside. Such petition shall be filed with the court within 30 days from the date of the issuance of the board's order. Upon the filing of such petition, the court shall cause notice to be served upon the board and thereupon shall have jurisdiction of the proceeding. The board shall file in the court the record of the proceeding, certified by the board within 10 days after the clerk's notice unless such time is extended by the court for good cause shown. The court shall have jurisdiction to grant to the board such temporary relief or restraining order it deems just and proper and in like manner to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part, the order of the board. The findings of the board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

An order directing an election shall not be stayed pending review, but such order may be reviewed as provided in Section 1158.

If the time for review of the board order has lapsed, and the person has not voluntarily complied with the

board's order, the board may apply to the superior court in any county in which the unfair labor practice occurred or wherein such person resides or transacts business for enforcement of its order. If after hearing, the court determines that the order was issued pursuant to procedures established by the board and that the person refuses to comply with the order, the court shall enforce such order by writ of injunction or other proper process. The court shall not review the merits of the order.

Appendix M

CALIFORNIA LABOR CODE § 1165(a)

§ 1165. Right to sue; venue; amount; agency; liability

(a) Suits for violation of contracts between an agricultural employer and an agricultural labor organization representing agricultural employees, as defined in this part, or between any such labor organizations, may be brought in any superior court having jurisdiction of the parties, without respect to the amount in controversy.

Appendix N

UNION SECURITY PROVISION

A. Union membership shall be a condition of employment. Each worker shall be required to become a member of the Union immediately following five (5) continual days after the beginning employment . . . and to remain a member of the Union in good standing. Union shall be the sole judge of the good standing of its members. Any worker . . . who has been determined to be in bad standing by the Union pursuant to the provisions of the Union's constitution shall be immediately discharged or suspended upon written notice from the Union to the Company, and shall not be reemployed until written notice from the Union to the Company of the worker's good standing status.

Appendix O

STATE OF CALIFORNIA,
AGRICULTURAL LABOR RELATIONS BOARD,

Case No. 78-CL-14-M
6 ALRB No. 16

UNITED FARM WORKERS OF AMERICA,
AFL-CIO,
Respondent,

and

J. JESUS R. CONCHOLA,
Charging Party.

DECISION AND ORDER

• • • • •

In a hearing before the Assembly Ways and Means Committee on May 27, 1975, Assemblyman Berman, an author of the Act, stated that the Board has the authority to determine whether the reason for expulsion from a union was "reasonable" under Section 1153(c). See Hearings on Senate Bill No. 1 Before the Assembly Ways and Means Committee on May 27, 1975, page 5. Then Secretary of Agriculture and Services Bird expanded on the meaning of the above-quoted portion of the section:

> [this section] gives to the board the power to look into the internal workings of every labor organization that files under this Act and has any kind of activity wherein there is a complaint lodged against the labor organization because they are asking one of their members to do something that does not comport with fairness and with due process. Now, that is a tremendous power that labor organizations traditionally have never been willing to give up and have never been willing to give to a board, and, in effect, this language is giving to the board that power, and, if you look at other sections

of the Act, this would allow the board, in extreme cases, to even go so far as to decertify a union, if, in fact, they're carrying on practices that the gentleman here described. See Hearings on Senate Bill No. 1 Before the Senate Industrial Relations Committee on May 21, 1975, pp. 71-72.[6]

---

[6]The gentleman to whose comments Secretary Bird referred, cited examples of requiring union members to go to demonstrations or meetings, or to take oaths of allegiance. *Ibid,* at pp. 68-69. We have not yet been presented with any such requirements in a case before us. If presented with mandatory rules contested by a dissenter, however, we would of course consider any constitutional rights rights claimed, such as the right of free speech, which might be threatened by requiring employees to attend political demonstrations.

While the federal law allows discharges from employment pursuant to the union security provisions only for failure to pay union dues and initiation fees, internal disciplinary measures for violations of other union rules are permitted. Examples include explusion or fines for crossing picket lines. Under the ALRA, if such discipline affects a worker's employment, this Board would have to consider the reasonableness of the union's action, Section 1153(c), and the many federal decisions dealing with such factors as the imposition of union penalties on nonmembers, the fairness of the union's rules in permitting resignation, and the reasonableness of their application. *See, e.g., NLRB v. Allis-Chalmers Mfg. Co.,* 388 U.S. 175, 65 LRRM 2449 (1967); *Scofield v. NLRB (Wisconsin Motor Corp.),* 394 U.S. 423 (1969); *NLRB v. Granite State Joint Board, Textile Workers, Local 1029,* 409 U.S. 213 (1972); *Machinists, Booster Lodge 405 (Boeing Co.) v. NLRB,* 412 U.S. 84 (1973); *Auto Workers, Local 1384 (Ex-Cello-O Corp.),* 219 NLRB No. 123, 90 LRRM 1152 (1975); *NLRB v. Machinists Lodge 1871,* 575 F.2d 54 (2d Cir. 1978); *NLRB v. Machinists Local 1327,* 608 F.2d 1219 (9th Cir. 1979).

Appendix P

Salinas, California

STATE OF CALIFORNIA,
AGRICULTURAL LABOR RELATIONS BOARD

Case Nos.
79-CL-59-SAL,
80-CL-5-SAL,
80-CL-4-SAL,
Case No. 80-CE-108-SAL,
Case No. 80-CE-29-SAL,
8 ALRB No. 103.

UNITED FARM WORKERS OF AMERICA,
AFL-CIO,
Respondent,

and

SEVERO PASILLAS, JUAN MARTINEZ, and
ODIS SCARBROUGH, Individuals,
Charging Parties.

MANN PACKING COMPANY,
Respondent,

and

JUAN MARTINEZ, Individual,
Charging Party.

SUN HARVEST, INC.
Respondent,

and

SEVERO PASILLAS, Individual,
Charging Party.

DECISION AND ORDER

* * * * *

The Constitutionality of Section 1153(c)

Charging Parties Pasillas and Scarbrough except to the ALO's failure to conclude that requiring membership in a labor organization, as a condition of continued employment, denies employees the right to work in the jobs of their choice and their First Amendment freedom to refrain from associating with the Union. Charging Parties argue that by sanctioning compulsory union membership, section 1153(c) also violates employees' constitutional rights.

Article III, section 3.5 of the California Constitution, added by referendum on June 6, 1978, forbids any administrative agency to declare a state statute unconstitutional. [Footnote omitted]. We therefore lack authority to rule on the Charging Parties' challenges to the constitutionality of the good standing provision in section 1153(c). We believe, however, that section 1153(c) comports with the constitutional standards articulated in numerous cases by the United States Supreme Court and the California Supreme Court. In *Railway Employees' Dept. v. Hanson* (1956) 351 U.S. 225, for example, the Court held that the right to work is not absolute and that it was reasonable for a legislature to regulate employment opportunities by allowing the negotiation of mandatory-union-membership clauses in collective bargaining agreements.

The Court's reasoning in *Hanson* appears applicable to the language of section 1153(c) which permits union-security agreements requiring union membership in good standing as a condition of continued employment. The policy stated in ALRA section 1140.2 of encouraging and protecting agricultural employees' rights to full freedom of association and to engage in collective bargaining with their employers is clearly a rational purpose for the exercise of

the Legislature's authority. Moreover, the "good standing" proviso to section 1153(c) of the Act, reasonably calculated to promote implementation of that policy, presents a reasonable limitation on the right to work and the right to freedom of association. Other authoritative rulings upholding legislatively imposed limitations on the right to work and the freedom of association, which need not be discussed at length here, similarly support the validity of section 1153(c). (See, e.g., *NLRB v. Allis-Chalmers Manufacturing Co.* (1967) 388 U.S. 175; *Abood v. Detroit Bd. of Education* (1977) 431 U.S. 209; *Pinsker v. Pacific Coast Society of Orthodontists* (1974) 12 Cal.3d 541.)

The Statutory Scheme of Section 1153(c)

As stated above, Labor Code section 1153(c) gives a labor organization representing agricultural employees the right, under a union security agreement, to require those employees to become and remain members of the union in good standing as a condition of continued employment. Section 1153(c) limits in two ways the power it thus vests in the union: first, all union membership requirements must be reasonable and uniformly applicable to all union members, and, second, union membership may not be terminated except pursuant to fair internal union procedures which protect basic rights. If these limits are exceeded, then this Board will find that the union's actions in terminating an employee's membership and employment rights violate section 1154(b) and (a)(1).

In our advisory opinion in *UFW (Jesus Conchola)* (Mar. 19, 1980) 6 ALRB No. 16, we noted that union security agreements permitted by section 1153(c) allow unions to exercise control over their member's employment opportunities, and we referred to the California Supreme Court's discussion of such control in *Gay Law Students Association v. Pacific Telephone and Telegraph Co.* (1979) 24 Cal.3d

458. The court there observed that a union afforded monopolistic control over employment by law "is not free to exercise its power arbitrarily." (24 Cal.3d at p. 476.) The court relied heavily on the earlier case *James* v. *Marinship Corp.* (1944) 25 Cal.2d 721, in which it had stated that "Where a union has ... attained a monopoly of the supply of labor ... such a union occupies a quasi public position similar to that of a public service business and it has certain corresponding obligations," 25 Cal. 2d at p. 731, and that by well-established common law principle,

> ... the holders of the monopoly must not exercise their power in an arbitrary, unreasonable manner so as to bring injury to others. The nature of the monopoly determines the nature of the duty. (25 Cal.2d at p. 732.)

The principle that a union's control over the supply of labor implies a corresponding duty and must be exercised fairly was recognized and given effect in the drafting and enactment of section 1153(c). As we pointed out in *Conchola, supra,* 6 ALRB No. 16, Assemblyman Howard Berman, an author of the Act, testifying on this section before the Assembly Ways and Means Committee on May 27, 1975, stated that the section gives the Agricultural Labor Relations Board (Board) authority to determine whether the basis for expulsion of a member by a union was "reasonable." [Footnote omitted]. Another of the drafters of the Act, then Secretary of Agriculture and Services Rose Bird, testified before the Senate Industrial Relations Committee that the oversight authority given by section 1153(c) to this Board to assure fair and reasonable internal union disciplinary procedures "is a tremendous power that labor organizations traditionally have never been willing to give to a board, and, in effect, this language is giving to the board that power, and ... this would allow the board, in extreme cases, to even go so far as to decertify a union if, in fact,

they're carrying on practices that [are unacceptable]." [Footnote omitted].

By authorizing this Board to review internal union disciplinary procedures for fairness and reasonableness, section 1153(c) implements the balance at which the common law has traditionally aimed, i.e., the balance between enjoyment of monopolistic or quasi-monopolistic control over employment opportunities and the duty of restraint and even-handedness in the exercise of that control. We shall carry out our oversight role with close attention, on a case-by-case basis, to the facts presented and the circumstances from which each such case arises.

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FILED
DEC 10 1984
ALEXANDER L. STEVAS,
CLERK

NO. 84-746

IN THE UNITED STATES SUPREME COURT

OCTOBER TERM, 1984

MARIA GUADALUPE NAVARRO,

Appellant,

vs.

AGRICULTURAL LABOR RELATIONS BOARD,

and

UNITED FARM WORKERS OF AMERICA, AFL-CIO,

Appellees.

ON APPEAL FROM THE CALIFORNIA COURT OF APPEAL, FIRST APPELLATE DISTRICT

MOTION OF APPELLEE AGRICULTURAL LABOR RELATIONS BOARD TO AFFIRM

DANIEL G. STONE
Solicitor of the Board
NANCY C. SMITH
Deputy Solicitor
CATHY A. CHRISTIAN
Deputy Solicitor
AGRICULTURAL LABOR RELATIONS BOARD
915 Capitol Mall, Third Floor
Sacramento, CA 95814
Telephone: (916) 322-7021

Counsel of Record for Appellee
Agricultural Labor Relations Board

#1445

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DANIEL G. STONE
Solicitor of the Board
NANCY C. SMITH
Deputy Solicitor
CATHY A. CHRISTIAN
Deputy Solicitor
AGRICULTURAL LABOR RELATIONS BOARD
915 Capitol Mall, Third Floor
Sacramento, CA 95814
Telephone: (916) 322-7021

Counsel of Record for Appellee
Agricultural Labor Relations Board

#1445

QUESTION PRESENTED

1. Is mere enactment of a state agricultural labor relations statute, which -- much as the original National Labor Relations Act -- permits labor organizations and employers to negotiate union shop agreements, sufficient governmental action to invoke constitutional scrutiny?

EDITOR'S NOTE

PAGES ii thru 31 WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

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STATEMENT OF THE CASE

Appellant Maria Guadalupe Navarro is an agricultural employee of Grower's Exchange, Inc. In January of 1979, Navarro's union, United Farm Workers of America, AFL-CIO (UFW), called a strike against her employer. In July of 1979, Navarro -- fully aware that UFW rules prohibited a member from working during a strike -- returned to work at Grower's Exchange, Inc., claiming economic necessity. On December 21, 1979, the UFW and Growers Exchange, Inc. reached agreement on a new collective bargaining contract which, like the previous contract, included a union security clause requiring membership in the union as a condition of employment. Such an agreement, termed a "union shop" and long permitted under California common law, is also permitted by California Labor Code section 1153(c).

UFW members, Navarro's co-workers,

brought charges against her for her strike-breaking activities. Although internal union disciplinary proceedings were held and Navarro was sanctioned, the Agricultural Labor Relations Board (ALRB or Board) overturned the union's actions, ordering that she be reinstated and made whole for economic losses she suffered as a result of the sanctions (Navarro had lost her membership in the union, and was subsequently fired). (Jurisdictional Statement (J.S.), App. A.)

Despite these remedies, Navarro sought review in the State Court of Appeal, pursuing a constitutional challenge to California Labor Code section 1153(c). Upon review of the Board decision, and of the various arguments concerning Navarro's constitutional claims, the Court of Appeal held that no governmental action was involved in the parties' inclusion of the union security provision in the UFW/Growers

Exchange collective bargaining agreement. The Court of Appeal therefore rejected Navarro's constitutional attack on the statute. (J.S. App., B-26 - B-41.)

ARGUMENT

Appellant presents two grounds for urging that the California Court of Appeal erred in interpreting the Agricultural Labor Relations Act (ARLB or Act)[1/] so as to find no state action in the statute's permissive treatment of contractual union security clauses. First, Navarro argues that state action is present in the fact that the ALRA does not prohibit union security provisions requiring union membership. Second, if state action is present, appellant contends that the statute violates the First Amendment guarantee of freedom of association, the "fundamental right to work," and

---

1. The ALRA is found at California Labor Code section 1140, et seq.

the Equal Protection Clause of the Fourteenth Amendment.

In this preliminary motion, Appellee ALRB will not discuss the second issue because, as the California Court of Appeal determined, no state action is present. Appellee will also demonstrate that -- of those issues which were presented to it -- the Court of Appeal analyzed each correctly. The ALRB therefore urges this Court to summarily affirm the opinion of the California Court of Appeal in Pasillas, et al. v. Agricultural Labor Relations Board (1984) 156 Cal.App.3d 350. (J.S., App. B.)

I

THE COURT OF APPEAL CORRECTLY DETERMINED THAT NO STATE ACTION IS PRESENT IN THE EXISTENCE OF UNION SECURITY CLAUSES NEGOTIATED UNDER THE CALIFORNIA AGRICULTURAL LABOR RELATIONS ACT.

The Court of Appeal correctly determined that California Labor Code section 1153(c) (J.S., App. I) does not involve the government in the decision of a

labor organization and an employer to negotiate union security agreements. In her argument to the state court, urging that state action be found, Navarro argued only that (1) the Board, in an earlier administrative decision, had conceded state action; (2) the California Constitution required a finding of state action; and (3) this Court's decision in Railway Employees Dept. v. Hanson (1956) 351 U.S. 225, and the First Circuit's decision in Linscott v. Miller Falls Co. (1st Cir. 1971) 440 F.2d 14 require a finding of state action in the operation of the ALRA.

The California Court of Appeal succinctly and correctly rejected each of these arguments. The first two do not present any possible federal question, and will not be discussed herein. The third argument ignores the fact that -- contrary to the Railway Labor Act (RLA), the statute under consideration in the Hanson decision --

California Labor Code section 1153(c) is a "passive" statute, mandating nothing whatsoever. In this sense, the ALRA is identical to the National Labor Relations Act (NLRA).

On its face, the ALRA is couched in exclusionary language. That is to say, section 1153(c) does no more than state that, if an employer and a union agree to the inclusion of a union shop clause in their collective bargaining agreement, the law will not treat such a clause as an unfair labor practice. Such clauses, if agreed to, are exempted from the class of conduct which the ALRA elsewhere defines to be unfair labor practices.

But the significance of the exclusionary cast of the statute is not only in the fact that the statute does not compel anything. For if, prior to the enactment of section 1153(c), the law in California prohibited union shop agreements, then

section 1153(c) would represent an important change in law, authorizing such agreements where they had once been precluded.

However, the plain fact is that section 1153(c) did not change California law, and this is the deeper significance of the statute's passive character. Section 1153(c) merely declares that the law in ~~California in existence prior to the enact~~ment of the ALRA will remain unchanged by that Act. The statute, therefore, does not authorize union shop agreements so much as it clarifies that the pre-existing right of an employer and a union to enter into a union shop agreement is not altered by the statutory provision defining and prohibiting unfair labor practices, so long as the union involved is the duly certified representative of the employees.

For nearly 80 years, California has permitted the union shop -- indeed, it has permitted even the "closed" shop. The ALRA

merely continued in existence this long-standing state policy. And it is precisely because section 1153(c) did not change the law in this respect, and does not create new rights or obligations, that Navarro's constitutional claims must fail. To invalidate section 1153(c) would effectively result in judicial legislation, prohibiting that which the California Legislature and the California courts have deliberately and consistently permitted: the union shop.

The ability of a union and employer to enter into a collective bargaining agreement providing for a union shop -- or even a closed shop -- has roots deep in California law. (See, e.g., J.F. Parkinson Co. v. Building Trades Council (1908) 154 Cal. 581, 598-600; see also, Shafer v. Registered Pharmacists Union (1940) 16 Cal.2d 379, 387 ["The courts of this state have recognized the validity of closed union shop agreements for more than thirty years"]; Gabaldon v.

United Farm Workers Organizing Committee (1974) 35 Cal.App.3d 757, 766-768; Colgate-Palmolive-Peet Co. v. N.L.R.B. (1949) 338 U.S. 355, 361-362.)

The California Supreme Court has even affirmed a superior court's issuance of a preliminary injunction restraining breach of a collective bargaining agreement's union security clause. (Silva v. Mercier (1949) 33 Cal.2d 704 [Complaint charged employer with improperly retaining workers who had failed to join the union.].)

In 1959, sixteen years before passage of the ALRA, the California Supreme Court expressly found that California law did not preclude union security agreements, so long as they were negotiated by a duly authorized collective bargaining representative of the employees. (Chavez v. Sargent (1959) 52 Cal.2d 162.)

In Petri Cleaners, Inc. v. Automotive Employees, Etc. (1960) 53 Cal.2d

455, the Supreme Court reversed the Chavez limitation on union security clauses. In Petri, the Supreme Court stated:

> We conclude that employers are not required by law to engage in collective bargaining and the closed or union shop agreements and concerted activities to achieve them are lawful in this state whether or not a majority of the employees directly involved wish such agreements. . . If a contrary rule is to be established, the Legislature, not this court, must enact it.

(53 Cal.2d at 474, 475; emphasis added; see also Messner v. Journeymen Barbers, Etc. International Union (1960) 53 Cal.2d 873; Englund v. Chavez (1972) 8 Cal.3d 572.)

It was against this background that the California Legislature in 1975 enacted the ALRA. Modeled after the National Labor Relations Act (NLRA), the ALRA creates a five-member quasi-judicial administrative tribunal to administer the Act's provisions. (Cal. Lab. Code, sec. 1141.) The ALRA expressly vests agricultural employees with organizational rights. In this regard, the

ALRA is nearly identical to the NLRA.

The ALRA also defines certain forms of conduct as "unfair labor practices." Although the Act states that it will be an unfair labor practice for an agricultural employer, by any term or condition of employment, "to encourage or discourage membership in any labor organization", an exception was provided for union security agreements. (Cal. Lab. Code sec. 1153(c).)

By enacting Labor Code section 1153(c), the Legislature therefore merely codified existing state law governing the enforceability of union shop agreements. In essence, the ALRA did nothing more than limit the scope of California's previous "laissez faire" approach to the issue by restricting such negotiations to elected representative unions. Far from creating a union right to negotiate a union shop agreement, the Act actually limited the pre-existing right, so as to ensure that the

bargaining union has majority support among the affected employees.

Quite apart from the fact that California's long history of permitting union shop agreements was not materially altered by Labor Code section 1153(c), there is the fact that the statute is, in any event, permissive and not mandatory. This is the critical fact that appellant ignores, and it is the basis for the California Court of Appeal's determination that no state action exists in the operation of the ALRA.

The California situation stands in sharp distinction to that described in Railway Employees' Department v. Hanson, supra, 351 U.S. 225. There, the Supreme Court preliminarily noted that the union shop provision of the federal RLA was only permissive: "Congress has not compelled nor required carriers and employees to enter into union shop agreements." (351 U.S. at 231.) However, contrary to the law in

California, the State of Nebraska had adopted a constitutional amendment prohibiting union shop agreements, whereas the RLA contained a provision permitting union security agreements notwithstanding the law of any state. The Hanson court concluded that, by virtue of the Supremacy Clause of Article VI of the United States Constitution, federal law superseded state law and made union security clauses permissible where they had been otherwise prohibited. This conflict was the source of governmental action which brought a constitutional dimension to the employees' objection to the contract: "If private rights are being invaded, it is by force of an agreement made pursuant to a federal law which expressly declares that state law is superseded. [Citations.] The enactment of the federal statue authorizing union shop agreements is the governmental action on which the Constitution operates, though it

takes a private agreement to invoke the federal section." (351 U.S. at 232; emphasis added.)

The same reasoning was used by the Supreme Court in International Association of Machinists v. Street (1961) 367 U.S. 740, which involved a conflict between the Railway Labor Act and a Georgia "right-to-work" statute (see Machinists Association v. Street (GA 1959) 108 S.E.2d 796), and in Brotherhood of Railway and Steamship Clerks v. Allen (1963) 373 U.S. 113, each involving a conflict between the permissive federal provision and the prohibitive state law. It was precisely that conflict which provided the requisite governmental action necessitating the consideration of constitutional issues. But the same result does not necessarily obtain where no such conflict exists.

The most recent Ninth Circuit holding on the issue is apparently Wicks v.

Southern Pacific Co. (9th Cir. 1956) 231 F.2d 130, cert. den. 351 U.S. 946.[2/] There, the circuit court ruled that a statue which merely permits a union shop agreement does not supply the requisite state action to invoke constitutional restraints. Moreover, addressing California's particular situation, the court gave this analysis:

> It was pointed out in [Otten v. Baltimore & O. R. Co. (2nd Cir. 1953) 205 F.2d 58], that there "might" be a substantial constitutional issue if state law prohibited the union shop while the amendment of Congress permitted the union shop. But the Second Circuit found no substantial constitutional issue on this ground as New York law did not prohibit the union shop. Here again, these cases before us fall within the facts of the Otten case. California, like New York, permits union security agreements, including a form even more liberal than the so-called union shop, namely the "closed shop."

(231 F.2d at 136-137; emphasis in orginial.)

(C.f., Adams v. Southern Calif. First Nat.

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2. Significantly, this Court denied certiorari in the Wicks case one week after its issuance of Railway Employees' Dept. v. Hanson, supra, 351 U.S. 225.

Bank (9th Cir. 1974) 492 F.2d 324, 328-329.)

This Court's recent decisions would seem to be consistent with the Ninth Circuit's Wicks reasoning. In Abood v. Detroit Board of Education, (1977) 431 U.S. 209, this Court expressly declined to extend constitutional restraints to private collective bargaining agreements absent some additional showing of state action.

In Abood, appellant employees sought to distinguish the ruling in Railway Employees' Dept. v. Hanson, supra, 351 U.S. 225, which permitted dues collections from non-members, on the ground that unlike the employer in Hanson, their employer was a public entity and should therefore be held to stricter constitutional standards. It will be remembered that, in Hanson, this Court found that union security clauses under the RLA did not violate the First or Fifth Amendments of the United States Constitution; the appellants in Abood argued

that a different result should obtain where the employer is the government. (431 U.S. at 226.)

This Court rejected appellants' efforts; state action, it ruled, is state action, whether that action results from the fact that the actor is the government itself, or from the fact that the actor acts pursuant to legislation. The Court noted that, in Hanson, the requisite governmental action was found in the fact that the union security provisions at issue would have been unenforceable but for the RLA's language expressly superseding conflicting state law. Having found state action, the Hanson Court nevertheless found no constitutional deprivation. No "greater" state action was provided by the facts in Abood, the Court held. (431 U.S. at 226.)

The majority's conclusion -- that its reliance on the Hanson constitutional analysis of the union security clause did

not depend upon the existence of a governmental employer -- drew sharp criticism from the dissent. The dissent read the majority's reasoning as holding "that the same constitutional constraints invariably apply when the government fosters or encourages a result in the private sector by permissive legislation as when it commands that result by the full force of law." (431 U.S. at 251, n. 5, conc. opn. of Powell, J.) Unlike the RLA, the Michigan statute at issue in Abood did not create the right to negotiate an agency shop agreement where such agreements were otherwise proscribed; like California's Labor Code section 1153(c), it merely provided that such agreements were not prohibited by state law. (See 431 U.S. at 214, n. 17.) It thus appeared to the dissent that the Abood majority had relied upon the Hanson analysis because, as in Hanson, the union security agreements at issue were authorized by statute; Justice

Powell would distinguish between permissive legislation and mandatory legislation.

The majority responded to the dissent's concern by expressly disavowing his construction of their reasoning. Hanson was applicable, the majority said, not because it found state action pursuant to the RLA, but because -- having found governmental action in the conflict between the RLA and the Nebraska statute -- the constitutional analysis of the union security agreement was relevant to the analysis in Abood:

> Nothing in our opinion . . . indicates that private collective-bargaining agreements are, without more, subject to constitutional constraints [citation to Justice Powell's opinion]. We compare the agency shop agreement in this case to those executed under the Railway Labor Act simply because the existence of governmental action in both contexts requires analysis of the free expression question.

(431 U.S. at 225, n. 23.)

Thus, this Court expressly eschewed any suggestion that the result in Abood

would have been the same whether or not the employer was a public entity. Indeed, in view of the vigor with which the majority answered the dissent's concern, it would not be unreasonable to conclude that the majority would have reached a different result had the employer been a private party operating under Michigan's permissive statute. It is thus true that the Abood court found no constitutional distinctions between the First Amendment rights of public and private sector employees; this is so, however, only when governmental action has resulted in a deprivation of constitutional rights to the private sector employee. Though governmental action was the source of the alleged deprivation in the Hanson case, it is not the source of Navarro's grievance here.

In any event, the expressed and unequivocal disavowal by the majority in footnote 23 of the Abood decision makes

abundantly clear that Abood is of no help to Navarro in this case. And, although the Ninth Circuit has yet to comment on footnote 23, the Court of Appeal for the District of Columbia Circuit -- citing footnote 23 in Abood -- has expressly ruled that "the authorization for agency shop clauses provided by NLRA section 8(a)(3) does not transform agency shop clauses into a right or privilege created by the state or one for whom the state is responsible." (Kolinske v. Lubbers (D.C. Cir. 1983) 712 F.2d 471; see also Reid v. McDonnell Douglas Corporation (10th Cir. 1971) 443 F.2d 408.) The only contrary decision actually analyzing state action under the NLRA is Linscott v. Miller Falls Co., supra 440 F.2d 14. And, as the California Court of Appeal noted, the Linscott majority opinion issued before the 1977 Abood decision of this Court which made clear that the state action in Hanson depended on the preemptive aspect of

the RLA. The NLRA of course does not pre-empt any contrary state authority prohibiting union shops; it is a passive statue much like the ALRA.[3/]

II

APPELLANT FAILED TO PROPERLY RAISE HER OTHER ARGUMENTS ON STATE ACTION TO THE CALIFORNIA COURT OF APPEAL; MOREOVER THESE ADDITIONAL ARGUMENTS ARE WITHOUT MERIT.

Appellant Navarro raises two additional arguments in support of her

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3. Pasillas also cites Ellis v. Brotherhood of Railway Clerks (1984) ___ U.S. ___ [104 S.Ct. 1883] for the proposition that this Court has decided the state action question. Ellis, decided under the Railway Labor Act, arose in California where, as noted, no conflicting "right-to-work" statute exists. The conflict noted in the Hanson case is therefore not present; this Court nonetheless addressed several constitutional issues. However, as the California Court of Appeal noted, neither the Ninth Circuit, which merely assumed the Hanson case applied, nor this Court actually addressed the issue of state action. Ellis does not therefore appear to be controlling on the issue. Furthermore, Pasillas' interpretation of the Ellis decision is at odds with a long line of previous federal authority, none of which was discussed in the Ellis opinion.

assertion of state action, both of which were raised for the first time in a petition for rehearing to the California Court of Appeal. Navarro argues that the analysis of Shelley v. Kraemer (1948) 334 U.S. 1, finding state action in the judicial enforcement of racially restrictive covenants, is analogous to (1) the enforcement powers of the ALRB, (2) judicial review of ALRB orders, and (3) suits for enforcement of collective bargaining agreements which are authorized by the ALRA. (J.S. 7-8; 11-13.) Navarro also argues that the "close nexus" analysis of this Court's decision in Jackson v. Metropolitan Edison Co. (1974) 419 U.S. 345 applies to this case because the ALRB reviews for "reasonableness" internal union rules which result in worker discipline. (Cal. Lab. Code secs. 1153, 1154.) However, as these arguments were not properly raised to the state court, they cannot now be considered by this Court. And even if they

were properly raised, these additional arguments are meritless.

A fundamental and long-settled rule governing this Court's review of a state court decision is that a federal question must first be raised to the state tribunal. The attempt to raise an issue upon petition for rehearing is too late, unless the state court actually entertains the question. (Herndon v. State of Georgia (1935) 295 U.S. 441, 443; Cardinale v. Louisiana (1969) 394 U.S. 437, 438; Illinois v. Gates (1983) ___ U.S. ___ [103 S.Ct. 2317].) This Court has indicated strong policy, as well as jurisdictional, grounds for this rule; namely, in our federal system, "it is important that state courts be given first opportunity to consider state statutes in light of [a] constitutional challenge." (Cardinale v. Louisiana, supra, 394 U.S. 437, 439; see also, Illnois v. Gates, supra, 103 S.Ct. 2323; McGoldrick v.

Compagnie Generale Transatlantique (1940) 309 U.S. 430, 434.)

Under California law, all relevant issues and arguments must be presented to the court before submission of the cause. Points cannot be raised for the first time in a petition for rehearing. (Prince v. Hill (1915) 170 C. 193, 195; People v. Mascotti (1962) 206 Cal.App.2d 772, 779.) Therefore, although Navarro did raise these additional arguments in her petition for rehearing to the California Court of Appeal, the state court was not required to consider them, and indeed, did not do so. The appellate court's opinion deals solely with the issues raised by Navarro and her co-petitioners before the case was submitted for decision. This Court has recognized that, in such circumstances, the federal issue was never properly presented to the state court. (Herndon v. State of Georgia, supra, 295 U.S. 441.) This is especially

true where there is no discussion of the federal issues in the state court's opinion; this Court will assume, absent evidence to the contrary, that the lack of discussion is due to a failure to properly present the question in the state court. (Webb v. Webb (1981) 451 U.S. 493, 501; Street v. New York (1969) 394 U.S. 576, 581-582.) Appellee ALRB therefore respectfully urges this Court to refuse to consider these additional arguments concerning state action.

However, even if these issues are considered, an examination of appellant's contentions reveal that they fail to demonstrate state action. The Shelley v. Kraemer analysis must fail for several reasons. First and foremost, under no construction of law can it be said that the ALRB enforces union security agreements. The same is of course true for judicial enforcement of ALRB orders. The Board merely determines whether conduct is an

unfair labor practice under the Act. If so, the Board acts only to restrain the unlawful conduct. Section 1165 of the Act is as neutral as section 1153(c) with respect to union security agreements. Section 1165 authorizes suits in state court for breach of collective bargaining agreements -- whatever provisions they might contain -- but parties to such agreements enjoyed such a right long before the ALRA was enacted under California common law.

In any case, a Shelley v. Kraemer situation does not exist here; this case does not involve any effort to enforce a collective bargaining agreement -- judicially or administratively.[4/] And it

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4. The enforcement powers of the ALRB (Cal. Lab. Code sec. 1160.3) are therefore wholly irrelevant. Appellant makes reference to the "make whole" provision of the Act, which empowers the Board to order the compensation of economic losses suffered by victims of a party's refusal to bargain in

(Footnote continued----)

is interesting to note that both the California Supreme Court and this Court have long permitted judicial enforcement of union shop clauses. (E.g., Colgate-Palmolive-Peet Co. v. N.L.R.B., supra, 338 U.S. 335, 361-362; Silva v. Mercier, supra, 33 Cal.2d 704.)

Finally, appellant argues that the expansive powers of the Board, in reviewing the reasonableness of internal union rules, provides a "sufficiently close nexus between the state and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the state itself." (Jackson v. Metropolitan Edison Co., supra, 419 U.S. 345, 351.)

(----Footnote 4 continued)

good faith as required by the statute. This make whole provision is if no consequence to the decision of two private parties to negotiate a union security clause, nor would it be employed in suits for breach of collective bargaining agreements.

In the Jackson case, this Court found no state action in the mere fact that a business -- therein a private utility -- was subject to state regulation. In fact, this Court expressly held that:

> The nature of governmental regulation of private utilities is such that a utility may frequently be required to obtain approval for practices a business regulated in less detail would be free to institute without approval from a regulatory body. Approval by a state utility commission of such a request from a regulated utility [termination of electric service without notice or hearing], where the commission has not put its own weight on the side of the proposed practice by ordering it, does not transmute a practice initiated by the utility and approved by the commission into "state action."

(Id. at 357; emphasis added.)

Like the Pennsylvania Public Utility Commission in the Jackson case, the ALRB has in no way fostered or encouraged the private conduct challenged here. Such union security agreements have long been permitted under California law, and the ALRA changed nothing in this respect. In fact, if ALRA section 1153(c) is invalidated,

agricultural unions and employers will still be free to sign union shop agreements. Appellant would have only succeeded in eliminating the ALRA's protection against unreasonable union rules. Nor is the state involved in the enforcement of union security agreements. The ALRB's review of union rules is only triggered by the filing of a charge, and is limited to a determination of whether an unfair labor practice has been committed. No nexus, let alone a close nexus, exists between the State of California and the private collective bargaining agreements of labor unions and employers.

CONCLUSION

There being no state action here, the sole issue in the underlying ALRB proceeding was whether the UFW's membership rule -- which requires union members to respect union picket lines -- is "reasonable" as contemplated by California

Labor Code section 1153(c). This is obviously an issue of purely local concern, and one which the state administrative body and state courts have already addressed. In addition, since no state action is present, the California Court of Appeal did not find it necessary to reach appellant's other constitutional issues. Appellee Agricultural Labor Relations Board therefore respectfully moves this Court to affirm the decision of the California Court of Appeal, First Appellate District, in Pasillas, et al. v. Agricultural Labor Relations Board (1984) 156 Cal.App.3d 350.

Dated: December 5, 1984

Respectfully submitted,

DANIEL G. STONE
Solicitor of the Board
NANCY C. SMITH
Deputy Solicitor
CATHY A. CHRISTIAN
Deputy Solicitor

Counsel of Record

Office - Supreme Court, U.S.
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(2)

No 84-746

IN THE UNITED STATES SUPREME COURT

OCTOBER TERM, 1984

MARIA GUADALUPE NAVARRO,

Appellant,

v.

AGRICULTURAL LABOR RELATIONS BOARD, and UNITED FARM WORKERS OF AMERICA, AFL-CIO,

Appellees.

On Appeal From The California Court of Appeal, First Appellate District, Div.2

APPELLEE'S MOTION TO DISMISS

DIANNA LYONS,
Counsel of Record
1201 24th Street
Sacramento, CA 95816
(916) 442-1862

Attorney for Appellee
UNITED FARM WORKERS
OF AMERICA, AFL-CIO

Dated: 7 December 1984

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QUESTION PRESENTED

1. Does the California Legislature's failure, when it enacted the State's Agricultural Labor Relations Act, to prohibit private union shop, union security agreements which were permitted under the State's pre-Act common-law, constitute "state action" sufficient to invoke the Fourteenth Amendment?

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No. 84-739

IN THE

SUPREME COURT OF THE UNITED STATES

MARIA GUADALUPE NAVARRO

Appellant,

v.

AGRICULTURAL LABOR RELATIONS BOARD, and UNITED FARM WORKERS OF AMERICA, AFL-CIO,

Appellees.

On Appeal from the California Court of Appeal, First Appellate District, Division Two

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APPELLEE'S MOTION TO DISMISS

Appellee United Farm Workers of America, AFL-CIO (UFW or Union), pursuant to Rule 16.1(b) of the Rules of the Supreme Court of the United States, moves the Court to dismiss the appeal

on the following grounds:

1. The appeal does not present a substantial federal question.

2. The Decision and Order of the California Court of Appeal correctly decided all issues properly before the Court.

COUNTER-STATEMENT OF THE CASE

California, like most of the States, took no action to afford its agricultural workers collective bargaining rights when Congress' 1935 enactment of the National Labor Relations Act (NLRA), 49 Stat. 477, excluded such workers from its protections. (29 U.S.C.§2(3).) Thus, for forty years following the federal enactment that assured industrial workers the rights to organize and elect exclusive union representatives and compelled employers to engage in good faith collective bargaining with unions selected by a worker majority (29 U.S.C.§§157-159), California farm workers were left to their own meager devices.

The workers are primarily migrants and their employment, seasonal. A "significant number read and understand only Spanish, Filipino, or other languages from India or the Middle East".[2] Wages have been uniquely low and fringe benefits, practically nonexistent.[3] Organizing efforts were historically met with crippling injunctions that effectively destroyed any possibility of winning union contracts or other concessions.[4]

Moreover, under California's laissez-faire policy, when farm workers came under union contract, employers were free to choose the union without regard for the workers' preference.[5]

The State's common-law imposed no restrictions upon union security agreements that private parties negotiated. Open shops--where

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2. Agricultural Labor Relations Bd. v. Superior Court 16 Cal.3d 392 (1976).

3. Legal Problems of Agricultural Labor, II Univ.Cal. L.Rev. (1970) at 39-46 and 113-171.

4. Shatz, "Picketing Injunctions in California: A Story of Farm Labor Disputes", 28 Hastings L.J. 801 (1977).

5. Englund v. Chavez, 8 Cal.3d 572 (1972).

union membership may not be compelled, union shops--where membership is required within a time certain of obtaining employment, and closed shops[6]--where union membership is a prerequisite to obtaining employment[7], were equally acceptable[8]. Indeed, workers could be compelled to join the union that contracted with their employer even if it represented none of the bargaining unit workers; and employers were under no legal compulsion to bargain with a union even if it represented one-hundred percent of the workers.[9]

Workers' struggle to unionize under such circumstances produced strikes, boycotts, and public clamor for legislation to protect farm

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6. California's common law, however, has long prohibited unions from arbitrary and invidious discrimination as to who is admitted to membership. James v. Marinship Corp., 25 Cal.3d 721, 740-741.

7. Grodin & Beeson, "State Right to Work Laws and Federal Labor Policy" 52 Cal.L.Rev. 95, 97 (1964).

8. Englund v. Chavez, supra., at 8 Cal.3d 596.

9. Ibid.

workers from employer abuses.[10/]

The California Legislature responded in 1975 by enacting the Agricultural Labor Relations Act (ALRA or Act)[11/] which expressly recognized the "economic dislocation and social injustice" under which farm workers labored, and the "presently unstable and potentially volatile condition in the state".[12/]

The Act follows the federal model in many respects, but deviates from the NLRA in many particulars in response to the exigencies of California agriculture as well as the historical problems the Legislature addressed. Elections, for example, must be conducted within seven days of the workers' petition seeking to voice their representative choice, and within forty-eight hours if a strike is in progress.

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10. Hyink, Issues and California Politics and Government, Crowell Co., New York (1977) at 8.

11. California Labor Code §1140 et. seq.. Hereinafter all statutory references are to the California Labor Code unless otherwise indicated.

12. Stats. 1975, Third Ex.Sess.,ch1,§1, No. 3 West's Cal. Legis. Service, p.304,no.2, Deering's Adv. Legis. Service, p. 1147.

13. Section 1156.3(a).

Elections are conducted by the Agricultural Labor Relations Board (ALRB or Board) upon a petition filed at a seasonal peak in employment by a majority of the workforce (§1156.3-1156.4). Those deviations from the federal model respond to California agricultural's migrant and seasonal employment patterns without sacrificing the State's policy to maximize seasonal workers' enjoyment of statutory rights (§1156.4) and, generally, to "encourage and protect" farm workers' exercise of rights to unionize (§1140.2).

The Legislature also elected to deviate from the federal model regarding union security agreements. The framers expressly rejected an amendment to adopt NLRA §8(a)(3) language which exempts employers' compliance with union security contracts which condition continued employment upon payment of periodic dues and assessments from the NLRA's unfair labor practice prohibition against employer discrimination to encourage or discourage union activity. (29 U.S.C.§158(a)(3).) Instead, the Legislature

drafted §1152--which describes employees' rights, §1153(c)--which proscribes employer discrimination on the basis of union activity, and §1154(b)--which proscribes such discrimination by unions, so that pre-Act State law was not disturbed. Section 1152 affirmatively provides farm workers self-organization, collective bargaining, and concerted activity "for mutual aid or protection" rights, and affords a less expansive "right to refrain" from such activities. Rather than a parallel right to refrain from statutorily protected employee activities, the Legislature granted a right to refrain

> "except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of continued employment as authorized in subdivision (c) of Section 1153".

Similarly, in §1153(c), the Legislature expressly exempted union security agreements that were permissible under pre-Act law from nullification by the ALRA when it excepted employer compliance with such union security agreements from that subdivision's prohibition

against discrimination to encourage or discourage union membership.

> "Nothing in this part, or in any other statute of this state, shall preclude an agricultural employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this section as an unfair labor practice) to require as a condition of employment, membership therein . . . if such labor organization is the representative of the agricultural employees . . . . (M)embership shall mean the satisfaction of all reasonable terms and conditions uniformly applicable to other members in good standing; provided, that such membership shall not be denied or terminated except in compliance with a constitution or bylaws which afford full and fair rights to speech, assembly, and equal voting and membership priviliges for all members, and which contain adequate procedures to assure due process to members and applicants for membership."

(§1153(c); emphasis added.)

Section 1154(b), the subdivision prohibiting union discrimination, includes a parallel exception reflecting the Legislature's decision to abstain from modifying pre-Act State law regarding union security agreements:

> "It shall be an unfair labor practice for a labor organization . . . to cause or attempt to cause an agricultural employer to discriminate against an employee in violation of subdivision (c) of Section 1153, or to discriminate against an employee with respect to whom membership

> in such organization has been denied or terminated for reasons other than failure to satisfy the membership requirements specified in subdivision (c) of Section 1153."

Thus, while the Act assures workers' unfettered right to form, join and assist unions and outlawed discriminatory reprisals, it did not assure an equally broad right to refrain from engaging in union activity. Instead, the Legislature carefully exempted prior law--which permitted the full range of union security agreements--from the Act's reach.[14/]

In addition, however, the Legislature codified pre-Act common-law barring arbitrary invidious discrimination, and statutorily assured members and applicants both substantive and procedural due process and equal protection It required that membership be conditioned only upon "reasonable terms and conditions uniformly

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14. Appellant's characterization of §1152 as granting rights and thereafter withdrawing them and his parallel claim that such a withdrawal constitutes state action for Fourteenth Amendment purposes misconstrues the legislative process. Rather than conferring a quantum of rights and subsequently withdrawing a portion thereof, the Legislature limited, at the outset, the body of rights conferred.

applicable to other members in good standing", and that membership be neither terminated nor denied except in compliance with "full and fair rights to speech, assembly, and equal voting and membership priviliges" as well as with procedural due process requirements.[15/] (§1153(c).)

Appellant's employer and the UFW agreed to a union shop union security agreement in each of their successive collective bargaining agreements. Upon the termination of one such Agreement, and prior to reaching a succeeding Agreement, the UFW engaged in a strike. Appellant crossed the Union's picket lines and broke the strike in contravention of the UFW's rule prohibiting its members from breaking its strikes. A Union member filed charges against Appellant, and she was tried and convicted of

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15. Such speech, association, and due process protections as well as the State's prohibition against arbitrary and invidious discrimination in union membership, have their origins in California's common-law which mirrors certain federal protections. See, e.g. DeMille v. American Fed. of Radio Artists, 31 Cal.2d 139 (1947); Cason v. Glass Bottle Blowers Assn., 37 Cal.2d 134 (1951); and Holderby v. Operating Engineers, 45 Cal.2d 843 (1955).

strike breaking. She was expelled from good standing in the Union, but appealed to the UFW's National Executive Board pursuant to the Union's Constitution. When her appeal was rejected as untimely, Appellant was notified of her further appeal rights to the Public Review Board but she delined to pursue that internal Union remedy. Instead, she filed an unfair labor practice charge.

Meanwhile, the UFW notified Appellant's employer, who was by then a signatory to a renewed collective bargaining agreement with a union shop provision, of Appellant's loss of good standing. The employer voluntarily complied with the union security agreement by discharging Navarro.

The Board, however, concluded that there were procedural infirmities in the Union's expulsion of Appellant from membership, and ordered the UFW to return her to good standing, to accomplish her reinstatement, and to make her whole for economic losses she suffered as a result of the union discipline imposed.

In spite of the fact that she was not aggrieved by the ALRB's final order, Appellant petitioned the Court of Appeal for review of the Board's Decision and challenged the constitutionality of §1153(c).

The California Court of Appeal, First Appellate District, Division Two, affirmed the Board's Decision in all relevant respects, and as to the constitutional challenge, concluded that no state action was involved to trigger application of the Fourteenth Amendment.

ARGUMENT

THE CALIFORNIA LEGISLATURE'S FAILURE TO PROHIBIT UNION SECURITY AGREEMENTS THAT PRE-ACT STATE LAW PERMITTED CONSTITUTES "STATE INACTION", RATHER THAN THE SORT OF "STATE ACTION" REQUIRED TO TRIGGER CONSTITUTIONAL SCRUTINY.

Appellant purports to rely upon this Court's Shelley v. Kraemer, 334 U.S. 1 (1948) opinion as support for his claim that state

action as contemplated by the Fourteenth Amendment is present here. The Shelley opinion, however, defeats that claim. There, the Court addressed restrictive covenants compelling arbitrary and invidious racial discrimination in housing. The lower court's judgment enforced the covenant and, thereby, the discrimination. This Court said:

> "the restrictive agreements standing alone cannot be regarded as a violation of any rights guaranteed to petitioners by the Fourteenth Amendment. So long as the purposes of those agreements are affectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the State and the provisions of the Amendment have not been violated...." (344 U.S. 1,13; emphasis added.)

It was the judicial enforcement of the restrictive covenants that followed the private individuals' refusal to voluntarily comply that constituted state action in Shelley. The Court made it quite clear that state inaction would not trigger constitutional scrutiny when the Court said:

> "These are not cases . . . in which the States have merely abstained from action, leaving private individuals free to impose such discrimination as they see fit. Rather, these are cases in which the States

> have made available to such individuals the full coercive power of government to deny to petitioners, on the basis of race or color, the enjoyment of property rights . . . . The difference between judicial enforcement and nonenforcement of the restrictive covenants is the difference to petitioners between being denied rights of property available to other members of the community and being accorded full enjoyment of those rights on an equal footing." (344 U.S. 1,19; emphasis added.)

See also, Barrows v. Jackson 346 U.S. 249 (1953) regarding California's refusal to enforce such covenants in an action for damages. This Court approved the California Supreme Court's conclusion that such judicial enforcement would contravene the Fourteenth Amendment but noted that "voluntary adherence would constitute individual action only". 346 U.S. at 253.

Similarly, in Mulkey v. Reitman, 64 Cal. 2d 529 (1966) the California Supreme Court opined that

> "However subtle may be the state conduct which is deemed 'significant', it must nevertheless constitute action rather than inaction. The ... Fourteenth Amendment is prohibitory in nature (and does not) impose upon the state an obligation to take positive action in an area where it is not otherwise committed to act. (64 Cal.2d 537-538.)

And, in a related case, this Court affirmed the California Supreme Court's conclusion that the "State was permitted a neutral position with respect to private racial discriminations and that the State was not bound by the Federal Constitution to forbid them". Reitman v. Mulkey, 387 U.S. 369 (1967), at 387 U.S. 374.

The union security Agreement at issue here was manifestly not enforced by the State. Neither the Board nor the reviewing Court engaged in any conduct even remotely resembling enforcement. Rather, the parties to the Agreement voluntarily complied with its terms. Nor is the ALRB empowered to enforce union security agreements. It is statutorily authorized to act only when an unfair labor practice charge is filed and then only to determine whether an unfair labor practice has been committed (§1160.3.) insofar as its functions relate to the case at bench. The only unfair labor practice prohibitions related to union security matters are §§1153(c) and 1154(b). Thus, in the union security realm, the Board could only

find one of two things: (1) that no unfair labor practice was committed, or (2) that an unfair labor practice was committed by an employer, a union, or both. The former would certainly not constitute enforcement of a union security agreement; and in the latter circumstance, the Board is only empowered to restrain the Agreement's enforcement (§1160.3).

Nor could the Union file an unfair labor practice charge and thereby engender Board enforcement of its Agreement with an employer who refused to voluntarily comply with contract terms such as a union security provision. Contract violations in and of themselves do not constitute unfair labor practices. Textile Workers Union v. Lincoln Mills 353 U.S. 448, 452 (1957); Mine Workers v. N.L.R.B., 257 F.2d 211, 214-215.

Nor, of course, does the present case present a justiciable controversy[16/] surrounding enforcement of a union security provision. Here,

16. Thus, addressing a state enforcement question would be in the nature of an advisory opinion and therefore impermissible. Flast v. Cohen, 392 U.S. 83,

the parties voluntarily complied with the union security agreement's terms.

The Railway Employees' Department v. Hanson, 351 U.S. 225 (1955) line of cases, similarly, provides no basis for concluding that state action is present here. In Hanson the Railway Labor Act (RLA) §2 Eleventh expressly superseded contrary state law. The case arose out of Nebraska. The State Constitution prohibited union shop union security agreements, but was superseded by the RLA provision permitting such union security devices. This Court said:

> "The Supreme Court of Nebraska said, 'Such action on the part of Congress is a necessary part of every union shop contract entered into on the railroads so far as those 17 (right to work) states are concerned for without it such contracts could not be enforced therein.' (Citations) We agree with that view. If private rights are being invaded, it is by force of an agreement made pursuant to federal law which expressly declares that state law is superseded." (351 U.S. 232.)

The California Legislature's enactment of §1153(c) had no similar impact. Prior to the enactment, unions were free to enter into

any type of union security agreement that they could persuade an employer to sign, and they were not even faced with a prerequisite of showing majority employee support. Englund v. Chavez, supra., at 8 Cal.3d 597. The private right to avoid compulsory unionism that Nebraska's citizens "enjoyed" prior to "congressional invasion" through RLA §2 Eleventh did not exist in California before 1975 (Colgate Palmolive Co. v. NLRB (1950) 338 U.S. 355) and does not exist here now. The fact that union shop agreements were permitted prior to §1153(c)'s enactment and are still permitted under its terms does not constitute governmental invasion of private rights.

Indeed, in Wicks v. Southern Pacific Co. 121 F.Supp. 454 (1953), aff'd, 231 F.2d 130 (9th Cir. 1956), and in Otten v. Baltimore 205 F.2d 58, a similar situation arose when union security provisions were challenged. The agreements also involved RLA §2 Eleventh, but arose in California and New York, respectively. Neither States' law prohibited union shops.

In both instances, the Courts found that there was no congressional invasion of private rights. The RLA altered nothing in either situation. Justice Learned Hand, writing for the Otten Court, and quoted in Wicks, said:

> "We cannot understand how the subsection can be regarded as conferring validity on the agreement; since all it does is exempt it from nullification by other statutes or laws". (Wicks, supra., quot- from Otten, at 231 F.2d ___, 37 LRRM 2725, 2729.)

That is precisely what §§1153(c) and 1154(b) do, here. Absent the provisos in those subsections, the Legislature's 1975 enactment of §1152-1154 would have substantially altered prior California law with respect to union security. Including those provisos, however, resulted in State law remaining unchanged with respect to the form(s) of union security that private parties may permissibly negotiate. The California Legislature abstained from such modification of State law, and opted instead to retain its pre-Act neutrality described in Englund v. Chavez, supra., as well as in Gabaldon v. United Farm Workers Organizing Com-

mittee, 35 Cal.App.2d 757 (1973) and Mendoza v. United Farm Workers Organizing Committee 487 F.2d 311 (9th Cir. 1973), cert. denied 415 U.S. 918.

A number of federal courts have reached a similar conclusion in litigation involving the NLRA which, unlike RLA §2 Eleventh, expressly does not supersede state right to work laws with its 29 U.S.C.§158(a)(3) union security proviso permitting a limited form of union shop (29 U.S.C.§164(b).) In Kolinske v. Lubbers, 712 F.2d 471 (D.C.Cir. 1983), the Court concluded that the NLRA's union security proviso is neutral in its impact upon pre-existing private rights to avoid compulsory unionism. (712 F.2d ___, 113 LRRM 2957,2962.) Similarly, in Reid v. McDonnel Douglas Corp., 443 F.2d 408 (10 Cir. 1971) the Court concluded that the NLRA, unlike the RLA, did not "insinuate itself into the decision of a union and an employer to agree to a union security clause so as to make that choice governmental action for purposes of the First and Fifth Amendment".

(443 F.2d 410-411, 77 LRRM 2609,2611.)

The First Circuit reached a similar conclusion in Hovan v. Carpenters, 703 F.2d 571 (1st Cir. 1983) and questioned whether state action has been too "liberally" found in labor cases. The Hovan Court also questioned whether constitutionalizing "union actions may bring about extensive change in our economic and political systems and not necessarily for the better".

In any event, the California Legislature's decision to refrain from altering prior State law's neutrality toward union security provisions certainly presents no governmental invasion of private rights. Rather, it constitutes the epitomy of state inaction.

Accordingly, the instant appeal should be dismissed for want of a substantial federal question.

CONCLUSION

California's response to the economic dislocation and social injustice suffered by

its farm worker citizens and residents sought to alleviate historically entrenched injustice that left individual workers powerless to deal efficaciously with their far more powerful employers. Toward that end the State borrowed from the federal model but also added unique provisions expressly designed to address the exigencies of California agriculture's migrant and seasonal employment patterns as well as the nascent developmental stage of the State's agricultural unions. With respect to union security, the Legislature chose to leave its prior neutrality unaltered, much as Congress addressed the issue in its 1935 enactment of the original NLRA, rather than adopting the more restrictive Taft-Hartley Amendment (61 Stat. 136 (1947), §8(a)(3).) that is presently 29 U.S.C.§158(a)(3). That policy choice was surely the State's to make, and just as surely constitutes state inaction rather than the sort of governmental invasion of pre-existing private rights that triggers application of the Fourteenth Amendment.

On that basis alone, the instant appeal should be dismissed.

Furthermore, the foregoing issue as well as each issue before it was correctly stated and decided by the California Court of Appeal, First Appellate District, Division Two. The State Court's scholarly opinion reflects a thorough analysis of the Legislature's intent as well as of the legal questions presented for the Court's decision. The State Court's opinion should therefore be affirmed and the appeal dismissed.

Appellee UFW therefore respectfully urges this honorable Court to dismiss the appeal for want of a substantial federal question and, thereby, to affirm the opinion below.

Dated: 7 December 1984

Respectfully submitted,

DIANNA LYONS
1201 24th Street
Sacramento, CA 95816
(916) 442-1862

Counsel of Record for
Appellee UNITED FARM
WORKERS OF AMERICA,AFL-CIO

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No. 84-746

IN THE UNITED STATES SUPREME COURT

October Term, 1984

MARIA GUADALUPE NAVARRO,

Appellant,

v.

AGRICULTURAL LABOR RELATIONS BOARD OF THE STATE OF CALIFORNIA, and UNITED FARM WORKERS OF AMERICA, AFL-CIO,

Appellees.

On Appeal from the California Court of Appeal, First Appellate District

REPLY BRIEF

RONALD A. ZUMBRUN
ROBIN L. RIVETT
COUNSEL OF RECORD
JAMES S. BURLING
OF COUNSEL
Pacific Legal Foundation
555 Capitol Mall, Suite 350
Sacramento, California 95814
Telephone: (916) 444-0154

Attorneys for Appellant

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No. 84-746

IN THE UNITED STATES SUPREME COURT

October Term, 1984

MARIA GUADALUPE NAVARRO,

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AGRICULTURAL LABOR RELATIONS BOARD OF THE STATE OF CALIFORNIA, and UNITED FARM WORKERS OF AMERICA, AFL-CIO,

Appellees.

On Appeal from the California Court of Appeal, First Appellate District

REPLY BRIEF

INTRODUCTION

Appellees have raised two primary objections to appellant's jurisdictional statement to which appellant takes this opportunity to reply. First, appellee, Agricultural

Labor Relations Board (ALRB), asserts that even if certain state action arguments are persuasive, this Court cannot consider them because they did not appear in appellant's original brief before the Court of Appeal, and were not made until appellant's petition for rehearing before that court. ALRB brief at 23-26. This inaccurate conclusion will be addressed below. Second, appellees raise again various misstatements of appellant's position regarding the presence of state action deriving from arguments found in Shelley v. Kraemer, 334 U.S. 1 (1948); Railway Employes' Department v. Hanson, 351 U.S. 225 (1956); and Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974). These misstatements will be corrected one more time, so that this Court will have the benefit of an undistorted presentation of appellant's position.

I

APPELLANT'S STATE ACTION ARGUMENTS FIRST MADE TO THE COURT OF APPEAL ON PETITION FOR REHEARING DO NOT FALL WITHIN THIS COURT'S BAN ON NEW FEDERAL QUESTIONS RAISED AFTER FINAL APPELLATE JUDGMENTS

Appellee, ALRB, seeks to force this Court to disregard the state action arguments made originally to the Court of Appeal in appellant's petition for rehearing arguing that

> "although Navarro did raise these additional [state action] arguments in her petition for rehearing to the California Court of Appeal, the state court was not required to consider them, and indeed, did not do so. The appellate court's opinion deals solely with the issues raised by Navarro and her co-petitioners before the case

was submitted for decision. This Court has recognized that, in such circumstances, the federal issue was never properly presented to the state court." ALRB brief at 25 (citation omitted).

Thus, appellee, ALRB, has attempted to create an appearance of impropriety by comparing appellant's new arguments to new federal questions. The case law does not support such a facile identification of arguments with underlying issues.

This very issue was addressed by the Court over 85 years ago in Dewey v. City of Des Moines, 173 U.S. 193 (1899), and recently rearticulated by the Court in Illinois v. Gates, ___ U.S. __, 76 L. Ed. 2d 527 (1983). Characterizing the Dewey decision as "the fullest treatment of the subject,"

the Gates Court went on to quote extensively in approval:

> "'[i]f [the Dewey court said] the question were only an enlargement of the one mentioned in the assignment of errors, or if it were so connected with it in substance as to form but another ground or reason for alleging the invalidity of the [lower court's] judgment, we should have no hesitation in holding the assignment sufficient to permit the question to be now raised and argued. Parties are not confined here to the same arguments which were advanced in the courts below upon a Federal question there discussed.'" Gates, 76 L. Ed. 2d at 536, citing

Dewey, 173 U.S. at 197-98 (emphasis added).

Appellant clearly raised the question of the presence of state action in the operation of the union security agreements at issue here throughout the state appellate process. This Court has made it plain that it will not, as appellees desire, penalize the fuller presentation of supporting arguments for disputed issues and questions that its jurisdiction pursuant to 28 U.S.C. § 1257 affords.

II

APPELLANT'S EXPOSITION OF THIS COURT'S STATE ACTION CASES ACCURATELY REFLECTS THE LAW

A. Appellees Continue to Misstate the Gravamen of Appellant's State Action Arguments

ALRB once again mischaracterizes appellant's state action contentions. ALRB writes: "Navarro argues that state action is present in

the fact that the ALRA does not prohibit union security provisions requiring union membership." ALRB brief at 3 (emphasis added). Nowhere has appellant advanced any such thesis, nor can her state action arguments legitimately be so characterized. Appellant's state action position is that the State of California in creating the legislation subsequently known as the Agricultural Labor Relations Act (ALRA), codified in the California Labor Code, has positively placed its "imprimatur" on the impairment of Ms. Navarro's fundamental right of freedom of association, and on her fundamental right to pursue her legitimate livelihood. This has been accomplished by a new statutory scheme that has several facets. It creates a state-sponsored cause of action for the breach of a contractually secured union

security agreement. Labor Code § 1165(a). It empowers the statutorily created ALRB to protect and foster union security agreements through cease and desist orders and the imposition of make-whole remedies. Labor Code § 1160.3. And it authorizes the state judiciary to use its full contempt power to procure conformity to those same union security agreements through the enforcement of ALRB orders. Labor Code § 1160.8. Appellant raises no complaint against the State of California's failure to act under such circumstances.

B. The Union Security Provisions of the ALRB Are Not Merely Passive and Lacking in Legal Compulsion; Even If the Union Security Provisions of the ALRB Had Effected No Change in California Law, State Action in the Operation of Union Security Agreements Would Be Present

Appellees have repeatedly striven to avoid appellant's state action arguments by denying that there has been any action at all. Appellee, ALRB, states:

"[T]he significance of the exclusionary cast of the statute is not only in the fact that the statute does not compel anything. ...

"... [T]he plain fact is that section 1153(c) did not change California law, and this is the deeper significance of the statute's passive character." ALRB brief at 6-7 (emphasis in original).

The protective and supportive statutory provisions as shown above (see Section II.A., supra) clearly belie these assertions. This Court has faced self-serving denials of state activity of this sort before, and cast them aside. See Shelley v. Kraemer, supra. The assistance actively provided to union security agreements by the

sections of the ALRA indicated above (see Section II.A., supra) are well within the Shelley rule as "manifestations of 'State authority in the shape of laws, customs, or judicial or executive proceedings.'" 334 U.S. at 14, citing the Civil Rights Cases, 109 U.S. 3 (1883).

That the state action occurs in relation to private agreements is not determinative. The assistance provided by the above sections of the ALRA to unions and employers in supporting, protecting, and enforcing their security agreement is subject to constitutional protections as Shelley requires: "Nor is the [Fourteenth] Amendment ineffective simply because the particular pattern of discrimination, which the State has enforced, was defined initially by the terms of a

private agreement." 334 U.S. at 20 (emphasis added).

Appellees' repeated assertions of the Act's "passivity" are almost incredible in the light of its legislative history. The very words of the architect of this statute referring to the ALRB's power of approval concerning the reasonableness of any individual use of the union security termination power dispel this notion:

> "[This section] gives to the Board the power to look into the internal workings of every labor organization that files under this Act and has any kind of activity wherein there is a complaint lodged against the labor organization because they are asking one of their members to do something that does not comport with fairness

and due process. Now, that is a tremendous power that labor organizations traditionally have never been willing to give up and have never been willing to give to a board and, in effect, this language is giving to the board that power ...." Hearings on Senate Bill 1 Before the Senate Industrial Relations Committee on May 21, 1975, at 71-72 (emphasis added).

In implementing this heightened level of state involvement in labor/management relations, the lower court required the performance by the board of at least 11 separate tests for the reasonableness of a union's termination decision under the security provisions of the Act. See Pasillas v. Agricultural Labor Relations Board;

United Farm Workers (Real Parties in Interest), 156 Cal. App. 3d 312, 356 (1984); Appellant's Jurisdictional Statement, Appendix at B-51-52. Power so broad and unprecedented reveals that the final board-approved action of the union should be treated as that of the state itself. Cf. Jackson v. Metropolitan Edison Co., 419 U.S. at 351. See also Jeffries v. Georgia Residential Finance Authority, 678 F.2d 919 (11th Cir. 1982), cert. denied, 459 U.S. 971 (1982) (superintendency by state housing finance agency of tenancy termination decisions demonstrates state action).

But appellees continue to argue that "it is precisely because section 1153(c) did not change the [California] law in this respect, and does not create new rights or obligations, that Navarro's constitutional

claims must fail." ALRB brief at 8 (emphasis added). This contention ultimately rests on the belief that California's pre-ALRA common law position of benign neutrality toward union security agreements can form no basis for a finding of state action. But this thinking was rejected in Shelley. Neutral state processes may not be used to impair fundamental rights. Where these fundamental rights are so impaired, there can be no benign neutrality.

Quoting extensively from Gabaldon v. United Farm Workers Organizing Committee, 35 Cal. App. 3d 757 (1973), the Court of Appeal in Pasillas found that the pre-ALRA policy of the State of California was "to encourage and protect union shop agreements," 156 Cal. App. 3d at 345, appellant's Jurisdictional Statement, Appendix

at B-35, through its evenhanded enforcement, protection, and support for all union contract provisions. Pasillas, 156 Cal. App. 3d at 346; appellant's Jurisdictional Statement, Appendix at B-36. But where fundamental rights are concerned, such "evenhanded" support and protection constitute encouragement of such agreements and thus state action. Reitman v. Mulkey, 387 U.S. 369 (1967). The fact that this state action was imbedded in California's common law of labor/management relations which preceded ALRA is a distinction without a difference, for judicial enforcement of common law policy is also state action. American Federation of Labor v. Swing, 312 U.S. 321 (1941); Cantwell v. Connecticut, 310 U.S. 296 (1940); Bridges v. California, 314 U.S. 252 (1941).

C. State Action Is Found Under Hanson, Ellis, and Recent Federal Decisions

Appellees consume a total of 15 pages lecturing the Court on their theory of the Hanson line of cases. Their argument runs: the Railway Labor Act (RLA), under which Hanson was decided, expressly overrode any opposing state right to work legislation, thus presenting state action. Therefore, where fundamental rights are impaired by operation of the RLA in a state with a right to work law, constitutional protection is available for the aggrieved employee. But, where the employee lives and works in a state with no right to work law for the RLA to override, no state action is present, and he has no constitutional protection of his fundamental rights. Likewise, the National Labor Relations Act, with no statutory override provision of local

right to work laws, presents no state action, leaving its covered workers without constitutional protection of their fundamental rights. Appellees thus argue in effect that the RLA creates a specially favored class of workers who are fortunate to be included in RLA trades and to live in right to work states. This dichotomy makes no sense.

The gravamen of Hanson is as follows. Where the government has taken a position of support, has placed its power, prestige, and authority behind a particular result, thus placing its "imprimatur" on an organized societal action of any sort, state action is present. This state action definition was articulated in Linscott v. Millers Falls Co., 440 F.2d 14 (1st Cir. 1971):

> "[I]f the company declined to discharge the plaintiff, the union could institute a federally supported suit, if not an unfair labor practice charge, for failure to live up to its bargaining agreement. ... In the case at bar the union's demand that the plaintiff be discharged is as federally supported as was the similar demand in Hanson." Id. at 17 (emphasis added).

Clearly, this consistent interpretation of the presence of governmental action in union security agreements ought to control the present case as well.

Appellees dispose of this Court's holding in Ellis v. Brotherhood of Railway, Airline, and Steamship

Clerks, 52 U.S.L.W. 4499 (Apr. 24, 1984), in a single footnote. They suggest therein that this Court never considered the state action issue and thus did not mean to address the issue even by implication. To the contrary, appellant believes that she in no way misstates the basis for the Court's holding in Ellis when she argues that the Court consciously accepted the propriety of the Linscott reasoning in granting to all workers subject to the RLA the constitutional protection of their fundamental rights in the context of union security agreements. Confirmation that other courts are also discarding hypertechnical obstacles to protection of workers' fundamental rights under union security agreements may be found in Beck v. Communications Workers of America, 468 F. Supp. 93 (D. Md. 1979); Havas v. Communications

Workers of America, 509 F. Supp. 144 (N.D.N.Y. 1981); and Lykins v. Aluminum Workers International Union, 510 F. Supp. 21 (E.D. Pa. 1980).

CONCLUSION

For the above reasons, appellant asks this Court to find state action, and to note jurisdiction so that it can act to protect appellant's fundamental rights still at issue.

December 14, 1984.

Respectfully submitted,

RONALD A. ZUMBRUN
ROBIN L. RIVETT
COUNSEL OF RECORD
JAMES S. BURLING
OF COUNSEL
Pacific Legal Foundation
555 Capitol Mall, Suite 350
Sacramento, California 95814
Telephone: (916) 444-0154

Attorneys for Appellant

AFFIDAVIT OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
COUNTY OF SACRAMENTO)

Donna M. Boek, being first duly sworn, says:

That affiant is a citizen of the United States, over 18 years of age, and not a party to the within cause; that affiant's business address is 555 Capitol Mall, Suite 350, Sacramento, California 95814; that affiant served the required number of copies of the attached REPLY BRIEF on each of the following, by placing the same in an envelope addressed as follows:

DANIEL G. STONE
Solicitor of the Board
NANCY C. SMITH
Deputy Solicitor
CATHY A. CHRISTIAN
Deputy Solicitor
Agricultural Labor Relations Board
915 Capitol Mall, Third Floor
Sacramento, California 95814

DIANNA LYONS
1201 24th Street
Sacramento, California 95816

that each of said envelopes was then, on December 14, 1984, sealed and deposited in the United States mail at Sacramento, California, with the postage thereon fully prepaid; and that there is delivery service by United States Mail at each place so addressed, or that there is regular communication by mail between the place of mailing and each place so addressed.

All parties required to be served have been served.

/s/ DONNA M. BOEK
DONNA M. BOEK

Subscribed and sworn to
before me this 14th day
of December, 1984

/s/ LINDA S. SCHAUPP
Notary Public in and for the County
of Sacramento, State of California